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CASES
REAL PROPERTY

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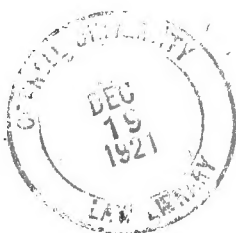
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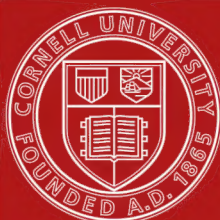
Selected cases on real property.



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SELECTED CASES
ON
REAL PROPERTY

BY
ANIE
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PREFACE

The object of this volume of cases is to include in a single volume, one case on each important principle of the law of real property, and in a few instances, where necessary to illustrate difficult doctrines, more than one case. Preference has been given to decisions of the Supreme Court of the United States, when such were available and suitable for a book of this character. The cases are intended to be used in connection with a text book on real property. The volume is especially designed for use with Tiffany on Real Property, and practically all of the cases it contains are cited in the foot notes of Tiffany's work. A majority of them, however, will be found cited in any good text book. While many recent cases are included; old leading cases have been found in some instances better adapted for this work than more modern decisions, the author having in mind as largely applicable to the whole law of real estate, the idea expressed by Mr. Justice Holmes in the case of *Gardiner v. Butler*, 245 U. S. 603, "But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke." In order that the three hundred and odd cases might be included in one volume, portions of opinions not dealing with the point to be illustrated have generally been omitted.

Washington, D. C.

JOSEPH D. SULLIVAN.

July, 1921.

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- Section 2. Movables and Immovables.
- Section 3. Lands, Tenements and Hereditaments.
- Section 4. Incorporeal Property.
- Section 5. Heirlooms.

SEC. 1. PROPERTY.

McKEON v. BISBEE.

9 Cal. 137; 70 Am. Dec. 642. (1858)

TERRY, C. J. This was an action to recover possession of a mining claim, the plaintiff alleging title and prior possession. The defendant set up a title by purchase at a sale under execution. A demurrer to the answer, on the ground that the facts stated constituted no defense, was sustained by the court below, and a judgment rendered in favor of plaintiff.

The question presented is, whether a mining claim is liable to seizure and sale under execution.

By our statute, "all goods, chattels, moneys, and other property, real and personal, of the judgment debtor, not exempt by law," is liable to execution.

Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is "the right and interest which a man has in lands and chattels, to the exclusion of others," and the term is sufficiently comprehensive to include every species of estate, real or personal; Jackson v. Housel, 17 Johns. 283; Doe, Lessee v. Langlands, 14 East. 370.

The legislature have by a series of enactments recognized the right of the miner to take and occupy, for mining purposes, a portion of the public domain; and have provided a remedy by action against all who trespass on his possession.

"By this appropriation, he acquires a vested interest in the exclusive occupation and enjoyment of the land as against all the world, subject only to the right of the government by whose license and permission his possession was acquired; and his right to protect the property for the time being is as full and perfect as if he was the tenant of the superior proprietor for years, or for life." *Merced Mining Company v. Fremont*, 7 Cal. 130 (68 Am. Dec. 762).

He has, in addition to the right of exclusive possession and enjoyment, the right of absolute disposition; and may sell, transfer, or hypothecate, without let or hindrance from any one. Contracts for the sale of such interests have been frequently recognized and enforced by the courts.

We think the interest of a miner in his mining claim is property, and not having been exempted by law, may be taken in execution.

Judgment reversed, and cause remanded for further proceedings.

SEC. 2. MOVABLES AND IMMOVABLES.

PENNIMAN v. FRENCH.

17 Pick. (Mass.) 404; 28 Am. Dec. 310. (1835)

* * * The word movable is derived from the civil law, and is one of the two great divisions into which property is divided; *bona mobilia* and *bona immobilia*. Dr. Johnson defines movables, as "goods; furniture; distinguished from real or immovable possessions, as lands or houses." And by the Dictionaire de l'Academie Francaise, we learn that the word is usually understood to signify the utensils which are to furnish or ornament a house.

The term movables, *bona mobilia*, would seem to comprehend personal property; and, if used without any adjunct or explanation, would include *mobilia quae se movent vel ab aliis moventur*, movables which move themselves, as well as movables which are moved by other or foreign agency or power. In *Termes de la Ley*, the word *catals*, or

chattels, is said to comprehend goods, movable and immovable, except such as are in nature of freehold, and parcel of it. That is a book of great antiquity and accuracy, as is observed by Bayley, J., in 5 Barn. & Cress. 229. But the word *bona*, goods, in the civil law, includes chattels real as well as personal, and also lands. * * *

HOLT v. HENLEY.

232 U. S. 637; 58 L. Ed. 767; 34 Sup. Ct. 459. (1913)

MR. JUSTICE HOLMES delivered the opinion of the court:

* * * This is a petition to the district court, sitting in bankruptcy for leave to remove an automatic sprinkler system and equipment from the premises of the bankrupt, the Williamsburg Knitting Mill Company. It is opposed by the trustee of a mortgage of the plant of the company and the holder of the mortgage notes, and by the trustees in bankruptcy, both of which parties claim the property. The referee, the district court, and the circuit court of appeals, decided in favor of the latter claims. 190 Fed. 871, 113 C. C. A. 87, 193 Fed. 1020. The petitioner, Holt, appeals. The facts are as follows: An agreement to install the sprinkler was signed by Holt on August 28, 1909, and by the bankrupt on October 14, 1909. The installation was begun about December 6, 1909, and finished in the latter part of March, 1910, the equipment consisting of a 50,000 gallon tank on a steel tower, bolted to a concrete foundation, pipes connecting the tank with the mill. By the agreement the system was to remain Holt's property until paid for, and Holt was to have a right to enter and remove it upon a failure to pay as agreed. It also was to be personal property during the same time. A large part of the price has not been paid. But by the Code of Virginia, 2462, unless registered as therein provided, which this was not, such sales are void as to creditors (construed by the Virginia courts to mean lien creditors only), and as to purchasers for value without notice from the vendee. On November 23, 1909, the mortgage deed was executed, covering the plant on the premises, and that "which may be acquired and placed upon the said premises during the continuance of this trust." The mortgagees claim the system by virtue of this clause and the fact that it had been attached to the soil. As bearing on this last it

should be added that there now is a smaller tank on the same steel tower, that supplies the mill for domestic purposes, but this was not put there by Holt. * * *

We turn now to the claim of the mortgagees. This is based upon the clause extending the mortgage to plant that may be acquired and placed upon the premises while the mortgage is in force, coupled with the subsequent attachment of the system to the freehold. But the foundation upon which all their rights depend is the Virginia statute giving priority to purchasers for value without notice over Holt's unrecorded reservation of title; and as the mortgage deed was executed before the sprinkler system was put in, and the mortgagees made no advance on the faith of it, they were not purchasers for value as against Holt. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 351, 352, 50 L. ed. 782, 784, 785, 26 Sup. Ct. Rep. 481. There are no special facts to give them a better position in that regard. But that being so, what reason can be given for not respecting Holt's title as against them? The system was attached to the freehold, but it could be removed without any serious harm for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. For, as we have said, the mortgagees have no equity and do not bring themselves within the statutory provision. We believe the better rule in a case like this, and the one consistent with the Virginia decisions so far as they have gone, is that "the mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less." *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Myer v. Western Car Co.*, 102 U. S. 1, 26 L. ed. 59; *Monarch Laundry v. Westbrook*, 109 Va. 382, 384, 385, 63 S. E. 1070; *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Davis v. Bliss*, 187 N. Y. 77, 10 L. R. A. (N. S.) 458, 79 N. E. 851; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33, 19 N. E. 753; *Cox v. New Bern Lighting & Fuel Co.*, 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 Ann. Cas. 936; *Baldwin v. Young*, 47 La. Ann. 1466, 17 So. 883; *Re Sunflower State Ref. Co.*, 115 C. C. A. 132, 139, 195 Fed. 180, 187. The case is not like those in which the addition was in its nature an essential indispensable part

of the completed structure contemplated by the mortgage. The system, although useful and valuable, can be removed and the works still go on.

Decree reversed.

SEC. 3. LANDS, TENEMENTS AND HEREDITAMENTS.

*Challis, Real Property (*36).*

The subjects in which estates may subsist are commonly subdivided into lands, tenements, and hereditaments; which is a cross division, of which the sub-classes are by no means mutually exclusive. Lands are treated as a separate class, by reason of their prominent importance and peculiar physical characteristics. Tenements require special mention, because they alone are intailable. Hereditaments is a convenient class-name for uniting together everything which may be the subject of estates of inheritance.

Land includes whatever is parcel of the terrestrial globe, or is permanently affixed to any such parcel. (Co. Litt. 4a-6a).

This is the meaning of the word in ordinary legal speech, and in this sense propositions respecting lands are generally to be understood. (See Co. Litt. 4a.)

Co. Litt. 4a.

"Terre," Terra, Land, in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, waters, marshes, furses, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terrae*; but properly, *terra disitur a terendo, quia vomere teritur*; and anciently it was written with a single r; and in that sense it includeth whatsoever may be plowed; and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings; for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith. Land is anciently called Fleth; but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedency to be demanded in the first place in a *præcie*, as hereafter shall be

said. And therefore this element of the earth is preferred before the other elements: first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; *Coelum coeli domino, terram autem dedit filiis hominum*: All the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, everything, as it serveth more immediately or more meerly for the food and use of man (as it shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man's food, and bread that strengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerful countenance; and therefore, *terra olim ops mater dicta est, quia omnia hac opus habent ad vivendum*. And the divine agreeth herewith; for he saith, *Patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, set et sepulchrum tibi hanc eandem dedit*. Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe*; but the land where-upon the water floweth or standeth is demandable; as for example, *viginti acras terrae aqua coopertas*: and besides, the earth doth furnish man with many other necessities for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad caelum*, as is holden 14 H. 8. fo. 12, 22 Hen. 6. 59. 10 E. 4, 14.

GODDARD v. WINCHELL.

86 Iowa, 71; 41 Am. St. Rep. 481; 52 N. W. 1124. (1892)

GRANGER, J. The district court found the following facts, with some others, not important on this hearing: "First. That the plaintiff, John Goddard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 98,

range No. 25, in Winnebago county, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. Second. That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. Third. That on the second day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto the plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. Fourth. That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland, took it to his house, and claimed to own same, for the reason that he had found same and dug it up. Fifth. That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for one hundred and five dollars, and the same was at once taken possession of by the said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that the defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. * * * Tenth. I find the value of said aerolite to be one hundred and one dollars (\$101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darker gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; that a member of Hoagland's family saw the aerolite fall, and directed him to it."

* * *

The subject of the dispute is an aerolite of about sixty-six pounds' weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a

character to be thought of as "unclaimed by any owner", and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by the appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of the appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet, and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our

prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as the appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of one hundred and one dollars, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with personal effects of third persons, is the owner thereof against all the world, except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by the appellant that this case is unique, that no exact precedent can be found, and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In 15 American and English Encyclopedia of Law, page 388, is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Society*, 16 Alb. L. J. 76, and 13 Ir. L. T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. *Anderson's Law Dictionary* states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. L. J.

299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field", but that of the finder. These references are entitled, of course, to slight, if any, consideration, the information as to them being too meager to indicate the trend of legal thought. * * *

BROWN v. SPILMAN.

155 U. S. 665; 39 L. Ed. 304; 15 Sup. Ct. 247. (1895)

MR. JUSTICE SHIRAS:

* * * The subject of the grant was not the land, certainly not the surface. All of that except the portions actually necessary for operating purposes and the easement of ingress and egress was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable through the land, or rather the right to take possession of the gas and oil by mining and boring for the same.

Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v. Vandergrift*, 80 Pa. St. 142, 147; *Westmoreland Nat. Gas. Co's. Appeal*, 18 Atl. 724.

To operate the machinery used in boring an oil well, it is necessary to erect a derrick, which is a structure of considerable height, and occupies a large space of ground. This derrick is also used, if oil be found, in connection with the pumping machinery. A very strong odor proceeds from a gas or oil well, and the noise of a well in operation can be heard for a long distance. These are some of the reasons why it is usual for farmers, when they grant the right to

drill for oil and gas, to stipulate that wells shall not be drilled in close proximity to their dwelling houses.

When oil or gas is found in paying quantities, it is not usual to consume it or reduce it to use at the wells, but it is conducted in iron pipes to large tanks or reservoirs, whence it is distributed by other pipes to the places of consumption, often many miles distant.

These are matters within the common experience or knowledge of all men living in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. 1 Greenl. Ev. 6.

Taking up the contract in the present case, we find that the grant is expressly "for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas, over all of that certain tract of land situate in Grant township, Pleasants county, and State of West Virginia, and bounded and described as follows (here follow the boundaries), containing forty acres, more or less, excepting reserved therefrom ten acres, beginning at the railroad (here follow boundaries), upon which no wells shall be drilled without consent of the party of the first part."

Do these latter words import an exception of the 10 acres, taking them wholly out of the grant, or a condition affecting the mode of enjoying the grant, and, as alleged in the cross bill, "for the personal benefit, comfort, and enjoyment of the said Taylor"?

As the grant in terms was for the purpose of boring and mining for oil and gas, and piping of oil and gas over all of the 40 acre tract, it would be strange if an exception of 10 acres was to be immediately added. If 30 acres only were to be included in the lease, and to be affected by its terms, the obvious course to pursue was to grant those 30 acres only. But if we read the grant as giving all the gas and oil under the entire tract of 40 acres, and the subsequent clause as a provision that, in exercising the rights granted, Brown should not, without the consent of Taylor, drill wells on the 10 acre plat, we shall thus give effect to all the language used.

There is given an express right to run pipes for gas and oil over the entire tract, and also a right of way to and from the place or places of mining. The so-called "exception" does not seek to reserve anything out of the grant to bore or mine for oil and gas, nor to restrict the rights of way to 30 acres. Its only purport is to forbid the drilling of wells upon the 10 acres. Whilst the lease, in some sense, may be said to cover the entire tract for gas and oil purposes, yet the operation of drilling wells, with its accompanying discom-

forts to those living on the tract, is restricted to the 30 acres. * * *

NORWALK HEATING AND LIGHTING CO. v. VERNAM.

75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168. (1903)

BALDWIN, J. The plaintiff owns certain land, which is substantially covered by the waters of the Norwalk river. The defendants own adjoining land on the river bank, having a brick building upon it extending to the boundary line. To this building they have attached a wooden structure, supported by beams resting on its foundation walls, which is ten feet wide and nineteen feet deep, and projects over the plaintiff's land without touching it. The plaintiff's title rests on a conveyance made after this structure was completed. It has requested the defendants, who are occupying it by tenants as part of a store, to remove it, and they have refused. It desires to build on its premises, and this structure prevents it from doing so, and interferes with its use of its land.

The complaint states substantially this case, and has been found true.

It is contended that the conveyance to the plaintiff was void because given when its grantor was ousted of possession: Gen. Stats. (Rev. 1902), sec. 4042. The Court of Common Pleas properly held that the possession of the projecting structure at that time by the defendants was no interference with the possession by the plaintiff's grantor of the premises over which it projected. The construction and maintenance of such a structure, like the construction and maintenance upon a house of eaves overhanging another's land, is an invasion of right, but not an ouster of possession: *Randall v. Sanderson*, 111 Mass. 114. The possession of the adjoining proprietor remains unaffected, except that it is rendered less beneficial. The possession and occupancy of the projecting structure has no effect on the ownership of the soil beneath, unless it be maintained, under a claim of right for fifteen years, and so should ripen into a perpetual easement.

It follows that equitable relief was properly claimed and granted. While the plaintiff might have itself removed the nuisance, without appealing to the courts, it was not restricted to reliance upon self-help. Nor had it only a right of action for damages. An injunction

might originally have been brought by the plaintiff's grantor to prevent the contruction of the projection. This not having been done, the plaintiff could ask for a mandatory injunction to prevent its wrongful continuance.

It is found that the defendants made this addition to their building without knowing that they had a right to do so, and in order to provoke a determination of that question by legal proceedings. While this absence of a direct claim of right might be material, were the question one as to their having gained an easement by an adverse user for fifteen years, it does not affect the plaintiff's cause of action in this proceeding. They cannot defend on the ground that they did not in fact make a claim which it would be naturally inferred from their acts that they were making.

There is no merit in the exceptions taken to the finding.

There is no error.

*Challis, Real Property (*37).*

Tenement is properly defined to include whatever can be the subject of common law tenure. ("Wherein a man hath any frank-tenement, and whereof he is seised *ut de libero tenemento*." Co. Litt. 6a.)

The meaning which the word actually bears is wider than that strictly contained in this definition. (Co. Litt. 19b. 20a.). The definition would strictly include only lands, such incorporeal hereditaments (seignories, peerages and dignities held by grand serjeanty) as are undoubtedly subjects of common law tenure, advowsons in gross (Co. Litt. 85a.), and perhaps chief rents. But the word "tenement" is in practice, with less obvious propriety, extended to include also rents-charge, commons in gross, estovers and other profits *a prendre*, owing to their close connection with the land; also offices annexed to or exerciseable within or over any lands or tenements, as the office of steward or bailiff of a manor, or ranger of a forest.

Co. Litt. 6a.

Tenementum, tenement, is a large word to passe not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is seised *ut de libero tenemento*. But *hereditamentum*, hereditament, is the largest word of

all in that kind; for whatsoever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt.

*Challis, Real Property (*38).*

Hereditament includes whatever upon the death of the owner passes (apart from testamentary disposition) to the heir by hereditary succession. (Co. Litt. 6a.) The word hereditary excludes special occupancy.

Land regarded as a hereditament stands in a peculiar position, because its existence is wholly independent of the manner in which estates in it are limited, while other hereditaments can only by a metaphor be said to have any existence apart from their limitation for estates of inheritance. The word hereditament, when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land. The use of a single name to denote two such disparate ideas, is not without inconvenience; but the practice is now inveterate.

Thus, with some degree of confusion, it is commonly said that land is both a tenement and a hereditament. Here it is evident that the word tenement is not used in exactly the same sense, as when a legal estate for life is styled a tenement; and that the word hereditament is not used in exactly the same sense, as when a rent-charge in fee simple is styled a hereditament. In the case of land, the estate contemplated is the legal fee simple; and since this exhausts the whole possible interests, by way of estate, in the land, and since, for most purposes, it matters little whether we speak of the land itself, or of the utmost possible interest in the land, some degree of obscurity is often permitted to exist as to which precisely of these two things is meant to be the subject of reference. The word has to some extent, a double meaning. In other cases, in which the thing has no real existence apart from the estate in the thing, the words used have only a single meaning.

It will easily be perceived that some tenements are not hereditaments, and that some hereditaments are not tenements.

SEC. 4. INCORPOREAL PROPERTY.

EWING v. RHEA.

37 Or. 583, 82 Am. St. Rep. 783; 62 Pac. 790. (1900)

Suit by Ewing against Rhea to enjoin interference with an irrigation ditch. The plaintiff was in possession of certain arid lands, to which he had constructed a ditch, running across land belonging to the defendant's grantors. He used the water for irrigating purposes. The defendant's grantors knew of, and acquiesced in, the construction of the ditch, and stood by and saw the plaintiff expend large sums of money in constructing the ditch and in improving his premises. The defendant, prior to securing a deed to a portion of his land, also knew of the situation, but he subsequently destroyed a portion of the plaintiff's ditch, thereby depriving him of the use of the water. The court sustained a demurrer to the complaint, the suit was dismissed, and the plaintiff appealed.

MOORE, J. The question to be considered is whether a complaint alleging a passive acquiescence by defendant's predecessors when they knew that plaintiff was expending large sums of money in making valuable improvements upon his land while relying upon the faith of the implied license to maintain said ditch, which, if revocable, would render such improvements valueless, states facts sufficient to constitute a cause of suit. Plaintiff's counsel contends that the complaint is sufficient in this respect, and that the court erred in sustaining the demurrer, and relies upon the case of *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, in which it appears that in 1865 the company's predecessor, with the consent and assistance of one Green Arnold, built a dam across a creek, and laid a pipe therefrom, by which water was diverted and conducted to the city of La Grande for the use of its inhabitants. Mrs. Curtis, the plaintiff therein, in 1876 acquired by mesne conveyances from Arnold the title to a tract of land through which said creek flowed, and in 1887 the company, without her express consent, built a new dam across the creek about one thousand feet above the old one, and taking up the conduit, relaid it from the new dam, and resumed the supply of water thereby. Mrs. Curtis having instituted a suit to enjoin the diversion, it appeared at the trial that the company changed the point of diversion under a claim to the use of the water which it believed was well founded; that Mrs. Curtis, with knowledge

of such claim, stood by without asserting any right to have the undiminished flow of the stream continue in the natural channel until she had seen the company expend large sums of money in improving its property, which, without the use of the water at the new point of diversion, would be rendered valueless, whereupon it was held that by her passive acquiescence she was estopped from asserting any right to the uninterrupted flow of the water in the creek. In *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10, it was held that the evidence of an irrevocable license should be clear and convincing, and show a permission to do the particular acts performed, or some participation in its execution by the alleged licensor. In *Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, it was held that a passive acquiescence was insufficient to create an estoppel, the court saying: "But such license must result from some consideration paid by the licensee, or some benefit accruing to the licensor; otherwise, a person entitled to the use of water might be deprived thereof by seeing a neighbor constructing a ditch, making no objection thereto until the water was diverted, under an honest belief that he intended to use only the surplus."

So, too, in *Hallock v. Sutor*, 37 Or. 9, 60 Pac. 384, it was held that a riparian owner upon a stream who made no objection when informed by a lower riparian proprietor that he intended to build a dam on her land was not estopped by any failure to assert her right, and that such passive acquiescence was not equivalent to a license to construct the dam. A license of this character is an authority to do some act or series of acts on the land of another for the benefit of the licensee without passing any estate in the land: *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 Pac. 127; *Stinson v. Hardy*, 27 Or. 584, 41 Pac. 116. "A license," says Mr. Justice Lord, in *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, "creates no interest in land. It is founded on personal confidence, and is not assignable; and its continuance depends on the pleasure of the party giving it, and is revocable unless executed under such circumstances as would authorize the interference of equity to prevent injustice." The rule is well settled in this state that if a party has paid a consideration therefor, or been encouraged by any participation in a common enterprise, or induced by a definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice: *Coffman v. Robins*, 8 Or. 279; *Huston v. Bybee*, 17 Or. 140, 20 Pac. 51; *Combs*

v. Slayton, 19 Or. 99, 26 Pac. 661; Curtis v. La Grande Water Co., 20 Or. 34, 23 Pac. 808, 25 Pac. 378; Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058; McBroom v. Thompson, 25 Or. 559, 37 Pac. 57, 42 Am. St. Rep. 806; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Lavery v. Arnold, 36 Or. 84, 57 Pac. 906; Hallock v. Suitor, 37 Or. 9, 60 Pac. 384; Miser v. O'Shea, 37 Or. 231, 62 Pac. 491. While frequent trespasses upon the track of a railroad company, of which it had no knowledge, does not create a license to use the track as a footpath (Ward v. Southern Pac. Co., 25 Or. 433, 36 Pac. 166), it must be conceded, we think, that a mere naked license by acquiescence may be created in favor of a person or the public by his or its use of real property or an easement therein without the owner's objection (Cederson v. Oregon R. R. & Nav. Co. (Or.), 62 Pac. 637); but a license of that character, unless enjoyed for such a time as to bar the statute of limitations, may be revoked at any time at the pleasure of the licensor: Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559; Parish v. Kaspere, 109 Ind. 586, 10 N. E. 109; Simpson v. Wright, 21 Ill. App. 67; Pitzman v. Boyce, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104. We do not think that upon principle a mere naked license, which is predicated upon an invasion of another's right, and is, in effect, a trespass upon his property, so encourages a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving property under a belief that the uninvited use relied upon will never be interrupted; and, in so far as the decision in Curtis v. La Grande Water Co., 20 Or. 34, 23 Pac. 808, 25 Pac. 378, is in conflict with the principle here announced, it is overruled. Upon this theory the complaint did not state facts sufficient to constitute a cause of suit, and, no error having been committed in sustaining the demurrer, the decree is affirmed.

Note: When the license has been acted upon and expense incurred in reliance thereon, it is held in Buck v. Foster, 147 Ind. 530; 62 Am. St. Rep. 427; 46 N. E. 920, it cannot be revoked without at least placing the licensee *in statu quo*. This is generally based upon estoppel *in pais* against the person who has allowed another to incur expense in a belief that the license granted will not be revoked.

See cases in chapter XVIII, Sec. 2, Licenses.

BANK OF AUGUSTA v. EARLE.

13 Pet. (U. S.) 519; 10 L. Ed. 274. (1839)

The Bank of Augusta, incorporated by the legislature of the state of Georgia, instituted in the Circuit Court for the southern district of Alabama, in March, 1837, an action against Joseph B. Earle, a citizen of the state of Alabama, on a bill of exchange, dated at Mobile, November 3, 1836, drawn at sixty days sight, by Fuller, Gardner and Co., on C. B. Burland and Co., of New York, in favour of Joseph B. Earle, and by him endorsed, for six thousand dollars. The bill was accepted by the drawees, but was afterwards protested for non-payment; and was returned with protest to the plaintiffs.

The following facts were agreed upon by the counsel for the plaintiffs and the defendant; and were submitted to the Circuit Court:—

“The defendant defends this action upon the following facts that are admitted by the plaintiffs; that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, etc. That the bill sued on was made and endorsed for the purpose of being discounted, by Thomas McGran, the agent of said bank, who had funds of the plaintiffs in his hands, for the purpose of purchasing bills, which funds were derived from bills and notes, discounted in Georgia by said plaintiffs, and payable in Mobile, and the said McGran, agent as aforesaid, did so discount and purchase the said bill sued on, in the City of Mobile, state aforesaid, for the benefit of said bank, and with their funds; and to remit said funds to the said plaintiffs.

“If the Court shall say that the facts constitute a defense to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest and costs; either party to have the right of appeal or writ of error to the Supreme Court, upon the statement of facts, and the judgment thereon.” * * *

(It was argued on behalf of the defendant in error that the State of Alabama had a sovereign right to make banking an affair of state, and contended that the State, by its legislation, had prohibited even its own citizens from dealing in banking, except in conformity to its peculiar laws, and the banking in that state must be regarded as a franchise. The court in that part of its opinion dealing with this subject, explains the character of a franchise).

TANEY, C. J. * * * It is true that in the case of *The State v.*

Stebbins, 1 Stewart's Alabama Reports, 312, the Court said that since the adoption of their constitution, banking in that state was to be regarded as a franchise. And this case has been much relied on by the defendant in error.

Now we are satisfied, from a careful examination of the case, that the word franchise was not used, and could not have been used by the Court in the broad sense imputed to it in the argument. For if banking includes the purchase of bills of exchange, and all banking is to be regarded as the exercise of a franchise, the decision of that Court would amount to this—that no individual citizen of Alabama could purchase such a bill. For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state.

But it cannot be supposed that the constitution of Alabama intended to prohibit its merchants and traders from purchasing or selling bills of exchange; and to make it a monopoly in the hands of their banks. And it is evident that the Court of Alabama, in the case of *The State v. Stebbins*, did not mean to assert such a principle. In the passage relied on they are speaking of a paper circulating currency, and asserting the right of the state to regulate and to limit it.

The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law; and it is very clear that at common law, the right of banking in all of its ramifications, belonged to individual citizens; and might be exercised by them at their pleasure. And the correctness of this principle is not questioned in the case of *The State v. Stebbins*. Undoubtedly, the sovereign authority may regulate and restrain this right: but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature, in relation to banking corporations; and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances; and the prosecution against Stebbins was not founded on the provisions contained in the constitution, but was under the law of 1827 above mentioned, prohibiting the issuing of bank notes. We are fully satisfied that the state never intended by its constitution to interfere with the right

of purchasing or selling bills of exchange; and that the opinion of the court does not refer to transactions of that description, when it speaks of banking as a franchise. * * *

GIBBS v. DREW.

16 Fla. 147; 26 Am. Rep. 700. (1877)

This is a proceeding under the unlawful detainer statute, brought by appellants to recover possession of a portion of the Jacksonville, Pensacola and Mobile Railroad, described by them. The complaint was dismissed, and defendant appealed.

WESTCOTT, J. While the statute regulating this special proceeding provides, "that if it shall appear to the court at the return day of the summons that the defendant has been duly served with said summons, agreeable to the requirements of this act, it shall proceed, without further pleadings in writing, to empanel a jury for the trial of the cause," still, in the very nature of things, the defendant may, in case he wishes to raise pure questions of law, adopt some method so to do without the intervention of a jury: The method here adopted was a motion to dismiss. To this no objection has been taken, and we think it is proper. This motion must be treated as a demurrer.

There is but one question which we think necessary to consider in the disposition of this case. That question is, what is the legal signification of the term "railroad" in this pleading, and do the terms "lands or tenements", as used in the statute regulating this proceeding, embrace railroads as defined? This complaint must be construed most strictly against the appellants. If the term "railroad" embraces something not included in the terms "land or tenements", and that something is not the subject of this proceeding, then that is an end of the matter.

As the term "highway" imports in law a road, the use of which is in the public, so the legal signification of the term "railroad" is not only a road or way on which iron rails are laid, but a road as incident to the possession or ownership of which important franchises and rights affecting the public are attached. This is unquestionably one of its significations. If it was the purpose of the appel-

lants to recover something other than this, or to recover a road to which no such incidents were attached, the description should be so framed as to bring the subject-matter of the action within the terms of the statute, that is, the metes and bounds should be stated according to the usual and well-recognized legal methods of boundary.

There is nothing here which would authorize us to conclude that this road has been the property of a corporation now dissolved, having lost its franchises by any of the various methods by which this may happen. We therefore treat it as a railroad to which belong the franchises usually attached to such a public work. The franchises which usually appertain to such a public work are incorporeal hereditaments as contra-distinguished from "land", which is a corporeal hereditament, and while the term "tenements" embraces some franchises, still this term as used in the statute must, from the nature of the proceeding, be restricted to tenements upon which an entry can be made, and of which there can be tangible possession. 6 Litt. 184. "Restitution ought only to be awarded for the possession of tenements visible and corporeal," says Baron Comyns in treating of this subject. Comyns' Dig., tit. Forc. Entry, Letter D 7.

The term "tenements" is used in the English statutes upon this subject, and yet, says Sergeant Hawkins, 1 Hawk. P. C., ch. 28 sec. 31, page 502, "it seems clear that no one can come within the danger of these statutes by a violence offered to another in respect of a way or such like easement which is no possession." The general rule under the English statutes is, that this proceeding is restricted to the recovery of the possession of hereditaments for which a writ of entry would lie at common law or by statute. Coke Litt. 343; Lamb Ins. 153. If this be so, and that it is so, cannot be doubted, the remedy cannot exist for the recovery of the possession of a public work to which is attached important prerogative franchises, rights and duties resulting from a special grant by the sovereign, and which cannot be included in any proper definition of the term "tenements" as used in this statute. But even if it be admitted that the right to the possession of a railroad as thus defined can be made the subject of this proceeding, it certainly must appear affirmatively, must be alleged in the complaint that the party is the owner of the franchises of a public character which exist in connection with it. These cannot be thus separated. There is no such allegation here. Again, the franchises which belong to the owners of the J., P. & M. Railroad exist necessarily as appurtenant to the ownership or possession of the whole line of road, and not to the ownership or possession of

a part. In the very nature of things, therefore, the plaintiff cannot be entitled to these franchises, as he claims an unlawful detainer of only a part of this road. The claim is for a "portion of the Jacksonville, Pensacola, and Mobile Railroad."

Our conclusion is that a railroad is a public work, the possession of which is attended with the right and duty to use and employ the franchises granted by the sovereign in connection with and as appurtenant to it, and that the proceeding of unlawful detainer does not lie to recover the possession of a part of such public work, as this necessarily involves the right to these franchises, and generally, that franchises appertaining to a railway being incorporeal hereditaments, intangible in their character, are not embraced within the terms "lands or tenements" in the act regulating this proceeding.

Judgment affirmed.

Note: In *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374, it was said:

"Now I take a franchise to be 1. An incorporeal hereditament and 2. A privilege or authority vested in certain persons by grant of the sovereign (with us, by special statute) to exercise powers, or to do and perform acts which without such grant they could not do or perform. Thus it is a franchise to be a corporation, with power to sue and be sued and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge or keep a ferry over a public stream, with a right to demand tolls or ferriage; or to build a mill upon a public river and receive tolls for grinding, etc. But the franchise consists in the incorporeal right; the property acquired is not the franchise."

SEC. 5. HEIRLOOMS.

Co. Litt. 18b.

If a nobleman, knight, esquire, etc., be buried in a church, and have his coat armor and pennons with his armes, and such other insignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, etc., for a monument of him, in this case albeit the freehold of the church be in the

parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire and his heires in the honour and memory of whose ancestor they were set up. And so it was holden Mich. 10 Ja. and herewith agree the lawes in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up, may have an action in that case against those that deface them in their time. And note, that in some places chattels as heir-loomes (as the best bed, table, pot, can, cart, and other dead chattels moveable) may go to the heire, and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heir-loome is due by custome and not by the common law. And the ancient jewels of the crowne are heir-loomes, and shall descend to the next successor, and are not devisable by testament. An heir-loome is called *principalium* or *hereditarium*.

CHAPTER II.

TENURE AND SEISIN.

- Section 1. Common Law Tenure.
- Section 2. Alienation and Subinfeudation.
- Section 3. Tenures Abolished.
- Section 4. Tenure in the United States.
- Section 5. Seisin.

SEC. 1. COMMON LAW TENURE.

Co. Litt. 64a.

Our author having taught us in his former book the several distinct estates of lands and tenements as most necessary to be known, for the understanding of these two other bookes, doth in this second book treat of the tenures and services whereby the said lands and tenements be holden; which he divideth into twelve parts, viz. Homage, Fealty, Escuage, Knight Service, Socage, Frankalmoigne, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage, and into Rents. Wherein his method is most excellent; for he beginneth with Homage, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love and protection of the lord towards his tenant, as hereafter shall appeare.

Secondly, Fealty, a sacred service, expressing by oath his fidelity to his lord.

Thirdly, Escuage which is *servitium scuti*, the service of the shield.

Fourthly, Knights service, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty, fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, Socage, the service of the plough, aptly placed next knights service, for that the ploughman maketh the best soldier, as shall appeare in his proper place.

Sixtly, Frankalmoigne, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honourable place: and secondly, because the first five preceding tenures and services, and the other sixe subsequent, must all become prosperous and useful, by reason of God's true religion and service. * * *

Seventhly, Homage auncestrell, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8. and 9. Serjeanty grand *et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due; which hath two notable effects. First, *imperii majestas est tutelae salus*, according to the old rule; and secondly, it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the Chapter before.

10. Then followeth the tenure of Burgage, of ancient burghes and cities, etc. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all commonwealths, especially of islands.

11. Villenage, for the performance of service, yet necessary service for the cleansing of cities, boroughes, mannors, etc. and for the better manuring of arrable grounds, and increase of husbandry.

12. And lastly, tenure by rents, which are called *vivi redditus*, because the lords and owners thereof do live by them; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value.

*Challis, Real Property (*6).*

The tenure by which this system was held together, because it existed by force of the common law, is often styled tenure by the common law or common law tenure. Since the decadence of the feudal system, which has deprived the true doctrine of tenures of nearly all its practical importance, the word tenure has often been confused with terms referring to the *quantum* of the tenant's estate: a confusion which is chiefly due to the fact, further referred to in the next following paragraph, that common law tenure is found only in connection with estates having a certain conventional *quantum*. But the word properly denotes the specific feudal relation subsisting between the lord and the tenant. (See Att. Gen. of Ontario v.

Mercer, 8 App. Cas. 767, at p. 772.) It refers only to those relations which were comprised within the feudal organization of the realm, and does not properly include the relation between a reversioner and a termor for years. Until the Statute of Gloucester (6 Edw. 1) gave a partial, and the 21 Hen. 8, c. 15, gave a complete remedy, the reversioner, as common law tenant of the freehold, had power to destroy the terms of years at his own will and pleasure, by suffering a collusive recovery.

There does not necessarily exist any definite relation between the nature of the tenure by which the tenant holds, and the *quantum* of the estate held by the tenant; but an invariable custom did, in fact, establish such a definite relation, and also went a considerable way towards maintaining a definite relation between the nature of the tenure and the political status of the tenant. Thus it is the fact (1) that common law tenure was always associated with estates not falling below a certain conventional *quantum*; and (2) that such tenure was so far associated with the status of a free man, that the grant to a villein by his lord of an estate to be held thereby, or (which is the same thing) the grant of an estate not falling below the standard *quantum*, would operate as an enfranchisement. From its connection with political status, the common law tenure acquired the name of free or frank tenure, and the common law estates were styled estates of freehold. These estates remain, in point of *quantum*, the same now as in the days of Littleton; but the practical importance of the distinction between estates of freehold and estates not of freehold, has been much lessened. Moreover, certain important distinctions have been enacted and established by statute, between estates of mere freehold arising under a settlement, and estates of mere freehold taken under a lease granted at a rent.

Both the nomenclature and the history of tenures shows that, so long as the feudal system retained its practical importance, a strong connection existed, both in public opinion and in common practice, between free status and free tenure, and between villein status and villein tenure. It is probable that, during the early period of the Norman conquest, the division between free and villein tenure accurately corresponded with the division of the population in regard to status; but the connection between tenure and status, at all events after the earliest days of the feudal system, was not absolute. (1) A free man did not lose his freedom by accepting lands to be held by villein tenure. (Litt. sects. 172, 174.) (2) Not only the grant of an estate of freehold, but also the grant of a term of years, or

any fixed interest whatever, greater than a tenancy at will, by the lord to the villein, operated as an enfranchisement; as also did the grant of an annuity, or the giving of a bond, or anything whereby the villein acquired the right to maintain an action against the lord. (Ibid, sects. 205, 208; and Lord Coke's comment.) The existence of these breaks in the connection between tenure and status is sufficiently explained by the leaning in *favorem libertatis*, which has from very early times been a marked feature of English law. (*Angliae jura in omni casu libertati dant favorem.*)

All free or common law tenure (other than spiritual tenure) was either in chivalry or in socage. (Litt. sect. 118.) It is necessary to restrict Littleton's words, which are general, to lay tenure; for frankalmoigne is indubitably entitled to rank as a distinct third kind of common law tenure. (Co. Litt. 86a.)

Litt. Sect. 95.

Escuage is called in Latin *Scutagium*, that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.

Litt. Sect. 73.

Tenant by copy of court roll is, as if a man be seised of a mannor within which mannor there is a custome, which hath beene used time out of minde of man, that certaine tenants within the same mannor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord according to the custome of the same manor.

Litt. Sect. 74.

And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

A. of B. cometh into this court, and surrendreth in the same court a mease, &c. into the hands of the lord, to the use of C. of D. and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires, issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

Litt. Sect. 75.

And these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

SEC. 2. ALIENATION AND SUBINFEUDATION.

*Challis, Real Property (*19).*

The practical result of the partial restraint upon alienation imposed by Mag. Cart. cap. 32, was, that lords exacted a fine upon alienation as to the price of their consent, without which their tenants could not make a safe title. The right to such fines was abolished, so far as the tenants of common persons are concerned, by the statute of *Quia Emptores*. But, as above mentioned, the tenants of the crown *in capite* acquired by the statute of *Quia Emptores* no rights as against the crown; and therefore fines upon alienation continued to be due from the tenants *in capite*, until expressly abolished by 12 Car. 2, c. 24.

One effect of the introduction of common recoveries into general

practice, was, that the king's tenants, *in capite* acquired power to alienate their lands, under pretence of a paramount title in the demandant, without compounding with the crown for fines on alienation. The statute, 32 Hen. 8, c. 1, s. 15, accordingly enacted, that fines for alienation should be paid upon obtaining writs of entry for suffering common recoveries. (Cruise, 2 Fines & Rec. 17.)

It is the general effect of the statute of *Quia Emptores*, so often as a mesne tenure for a fee simple is extinguished by union of the land and the lordship in the same hands, to prevent the mesne tenure from being ever again revived by any act of the parties. Thus, by the gradual extinction of the mesne tenures, the seignory of all freehold lands held for a fee simple tends to become concentrated in the crown

SEC. 3. TENURES ABOLISHED.

*Challis, Real Property (*21).*

By it (Stat. 12, Car. 2, c. 24) (1) the Court of Wards and Liveries is abolished, and the burdensome incidents of knight service and of socage *in capite*, including fines for alienations, are discharged as from 24th February, 1645, since which date the Court of Wards and Liveries had ceased to hold sittings; (2) all tenures, whether of the king or of any person or corporation, are turned into free and common socage as from the same day; (3) all conveyances and devises of any hereditaments made since the same day are to be expounded as if the same hereditaments had been held in free and common socage; (4) certain statutes passed for the establishment and regulation of the abolished court are repealed; (5) all tenures thenceforward to be created are to be and to be adjudged free and common socage only. (Sects. 1-4.)

The savings out of the Act require more particular mention.

1. The Act does not take away rents certain, heriots or suits of court belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident to tenure in common socage, or the fealty and distresses incident thereunto. (Sect. 5.)

2. The Act does not take away fines for alienation due by particular customs of particular manors and places, other than fines for

alienation of lands or tenements holden immediately of the king *in capite*. (Sect. 6.)

3. The Act does not take away tenures in frankalmoigne, or subject them to any greater or other services than they were then subject to; nor does it alter or change any tenure by copy of court-roll or any services incident thereunto; nor does it take away the honorary services of grand serjeanty. (Sect. 7.) But there is no saving of the last mentioned tenure.

4. Nothing in the Act is to infringe or hurt any title or honour, feudal or other, by which any person hath or may have right to sit in the Lord's House of Parliament, as to his or their title of honour or sitting in parliament, and the privilege belonging to them as peers. (Sect. 10.)

SEC. 4. TENURES IN UNITED STATES.

VAN RENSSELAER v. HAYS.

19 N. Y. 68; 75 Am. Dec. 278. (1859)

Appeal from a judgment of the Supreme Court for arrears of rent adjudged to be due upon one of the ancient "manor leases," formerly so well known in New York state. The lease or grant in question was made in 1796 by Stephen Van Rensselaer. It granted the lands described to Jacob Dietz in fee, reserving an annual rent in produce; and it contained a covenant by the grantee for himself, his heirs, executors, etc., and assigns, for the payment of the rent to the grantor, his heirs and assigns; also a clause authorizing the grantor, etc., in case of non-payment of rent, to proceed by distress or by action at his option; and another reserving right of re-entry in case of any breach of covenant. The plaintiff claimed the rights of the lessor under a devise from Van Rensselaer; and the defendant claimed those of lessee under assignment from Dietz. * * *

DENIO, J. The defendant's position is, that the covenant for the payment of the rent is, in law, personal between the grantor and grantee, or what is sometimes called in the books a covenant in gross, and consequently, that after the death of the original parties no action to recover rent can be maintained in favor of or against any persons except their respective executors or administrators. As

the law contemplates that the estates of deceased persons shall be speedily settled, and in the natural course of things the personal representatives of a man disappear with the generation to which they belong, the intention of the parties to the indenture to create a perpetual rent issuing out of the premises will, if that position can be maintained, be entirely disappointed; and the argument is, in effect, that the law does not permit arrangements by which a rent shall be reserved upon a conveyance in fee, and that where it is attempted the reservation does not affect the title to the land, but the conveyance is absolute and unconditional. The design of the parties to create relations which should survive them, and continue to exist in perpetuity by being annexed to the ownership of the estate of the grantee of the land on the one hand, and of the rent on the other, is manifest from the language of the instrument. They were careful to declare that the obligation to pay the rent should attach to those who should succeed the grantee as his heirs and assigns, and should run in favor of the heirs and assigns of the grantor; and the nature of a perpetually recurring payment requires that there should be an endless succession of parties to receive and pay it. We have a legislative declaration, in an act of 1805, passed about ten years after this conveyance, that grants in fee reserving rents had then long been in use in this state (c. 98); and the design of the legislature by that enactment was not only to render such grants thereafter available according to their intention, but to resolve, in favor of such transactions, the doubts which it is recited had been entertained respecting their validity. Still, if, by a stubborn principle of law, a burden in the form of an annual payment cannot be attached to the ownership of land held in fee-simple, or if the right to enforce such payment cannot be made transferable by the party in whom it is vested, effect must be given to the rule, though it may have been unknown to the parties and to the legislature; unless, indeed, the interposition of the latter by the statute which has been mentioned can lawfully operate retrospectively upon the conveyance under consideration.

It is not denied but that by the early common law of England conveyances in all respects like the present would have created the precise rights and obligations claimed by the plaintiff; but it is insisted that the act respecting tenures, called the statute of *quia emptores*, enacted in the eighteenth year of King Edward I., and which has been adopted in this country, rendered such transactions no longer possible. The principles of that statute have, in my opinion, always

been the law of this country, as well during its colonial condition as after it became an independent state. A little attention to the pre-existing state of the law will show that this must necessarily have been so. In the early vigor of the feudal system, a tenant in fee could not alienate the feud without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, which consisted in the tenant enfeoffing another to hold of himself by fealty and such services as might be reserved by the act of feoffment. Thus a new tenure was created upon every alienation; and thence there arose a series of lords of the same lands, the first called the chief lords, holding immediately of the sovereign; the next grade holding of them, and so on, each alienation creating another lord and another tenant. This practice was considered detrimental to the great lords, as it deprived them to a certain extent of the fruits of the tenure, such as escheats, marriages, wardships, and the like, which, when due from the terre-tenants, accrued to the next immediate superior. This was attempted to be remedied by the thirty-second chapter of the Great Charter of Henry III. (A. D. 1225), which declared that no freeman should thenceforth give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him which belonged to the fee: 1 Ruffhead's Statutes at Large, 8. The next important change was the statute of *quia emptores*, enacted in 1290, which, after reciting that "forasmuch as purchasers of lands and tenements (*quia emptores terrarum et tenementorum*) of the fees of great men and other lords had many times entered into their fees to the prejudice of the lords," to be holden of the feoffors, and not of the chief lords, by means of which these chief lords many times lost their escheats, etc., "which thing seemed very hard and extreme unto these lords and other great men," etc., enacted that from thenceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffor held before: Id. 122.

The effect of this important enactment was, that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffor before occupied; that is, he held of the same superior lord by the same services, and not of his feoffor. The system of tenures then existing was left untouched,

but the progress of expansion under the practice of subinfeudation was arrested. Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation: 1 Kent's Com. 473, and cases cited in note *a* to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178; and when the first constitution of this state came to be framed, all such parts of the common law of England and of Great Britain, and of the acts of the colonial legislature, as together formed the law of the colony at the breaking out of the revolution, were declared to be the law of this state, subject, of course, to alteration by the legislature: Art. 35. The law as to holding lands, and of transmitting the title thereto from one subject to another, must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the crown, and as the king was not within the statute *quia emptores*, a certain tenure, which after the act of 12 Car. II., c. 24, abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not tenure prior to the 18 Edw. I., *People v. Van Rensselaer*, 9 N. Y. 334. But, with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the colony, and that it was the law of this state, as well before as after the passage of our act concerning tenures in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the state government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the conquest, before the commencement of the year-books, and long

before Littleton wrote his treatise upon tenures. * * *

We are then to ascertain the effect of a conveyance in fee reserving rent, upon the assumption that the statute of *quia emptores* applies to such transactions. In the first place, no reversion, in the sense of the law of tenures, is created in favor of the grantor; and as the right to distrain is incident to the reversion, and without one it cannot exist of common right, the relation created by this conveyance did not itself authorize a distress. The fiction of fealty did not exist. The rent in terms reserved was not a rent-service: Lit., secs. 214, 215. It was, however, a valid rent-charge. According to the language of Littleton, "if a man by deed indented at this day maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, etc., such a rent is a rent-charge, because such lands or tenements are charged with such distress by force of the writing only, and not of common right:" Id., secs. 217, 218. And the law is the same where the conveyance is by deed of bargain and sale under the statute of uses: Co. Litt. 143b. Mr. Hargrave, in his note to this part of the commentaries, expresses the opinion that a proper fee farm rent cannot be reserved upon a conveyance in fee since the statute of *quia emptores*; but he concedes that where a conveyance in fee contains a power to distrain and to re-enter, the rent would be good as a rent-charge: Note 235 to Co. Lit. 143b. Blackstone says that upon such a conveyance the land is liable to distress, not of common right, but by virtue of the clause in the deed: 2 Bla. Com. 42.

These authorities establish the position that upon the conveyance under consideration a valid rent was reserved, available to the grantor by means of the clause of distress. This rent, though not strictly an estate in the land, *Payn v. Beal*, 4 Denio, 405, is nevertheless a hereditament, and in the absence of a valid alienation by the person in whose favor it is reserved, it descends to his heirs. Its nature, in respect to the law of descents, is explained by Lord Coke, who at the same time points out the distinction between such a rent as we are considering and a rent-service reserved upon a feoffment which created a tenure. He says that if a man "seised of a manor, as heir on the part of his mother, before the statute of *quia emptores*, had made a feoffment in fee of parcel, to hold of him by rent and service, albeit they (the services) are newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir on the part of the mother. If a man so seised, that is, by

inheritance from his mother, maketh (now) a feoffment in fee, reserving a rent to him and his heirs, this rent shall go to the heirs on the part of the father." Co. Lit. 12b. * * *

SEC. 5. SEISIN.

*Challis, Real Property (*76).*

Seisin may therefore be defined to be a possession of land founded upon the title given by an estate known to the common law; or, which is the same thing, by an estate of freehold. (Co. Litt. 17a.) As the origin and primitive status of terms of years fell into oblivion, the word possession gradually acquired a more extended meaning than the word seisin. It is now commonly used to mean any possession which is founded upon any title which the law, as now administered, will recognize and protect.

When a number of successive vested estates of freehold are derived out of the same original estate, the tenants of all such estates, though only one of them can at one time be vested in possession, are said to be in of the same seisin. The first in order of the estates, which is vested in possession as well as in interest, is said to confer the right to the actual seisin or immediate freehold.

Any estate which, if vested in possession, would give the right to the immediate freehold, but which imports no inheritance, is styled an estate of mere freehold. The only estates of this nature are estates for life (including tenancy in tail "after possibility") and estates *pur autre vie*.

The seisin is quite independent of, and unaffected by, the existence of any term or terms of years. Therefore, so far as the seisin is concerned, there can exist no such thing as a remainder of freehold expectant upon a term of years. The existence of a prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession. (Boraston's Case, 3 Rep. 19; see what is said at p. 21a about the estate of the executors, and connect this with the fact, that judgment was given for the defendant. See also Litt. sect. 60, where the words, "If the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor," show the same thing.) During the continuance of the term, the estate of free-

hold is properly described, not as being a remainder of freehold upon the term of years, but as being the freehold in possession subject to the term. But since the possession of the freeholder is in such a case subject to the rights of the termor, and since these rights may, and in practice usually do, deprive the freeholder of the immediate use and occupation of the lands during the term, the result is, for many practical purposes, much the same as if the freehold subsisted only as a veritable remainder. In this sense the word remainder is often applied to estates of freehold limited after a term of years. But when this language is used, the reader must bear in mind, (1) that a prior term of years does not prevent a subsequent vested estate of freehold from being an estate of freehold in possession; and (2) that a prior term of years does not prevent a subsequent contingent estate of freehold from being void in its inception, as being an attempt to create a freehold *in futuro*.

By the common law, the tenant of the immediate freehold was the only person against whom a writ could be brought in a real action, or from whom the lord could demand the feudal services incident to the tenure: and in ancient times this was equivalent to saying that, during abeyance of the immediate freehold, all rights both public and private, in reference to the land, were in abeyance also. This sufficiently explains the common law rule, that every act of parties is void, by which, if it were taken to be valid, the immediate freehold would be placed in abeyance. The strictness of this rule is absolute; under no circumstances whatever, by the common law, can the immediate freehold be placed in abeyance by any act of parties. (1 Prest. Est. 216.) From this rule some very important consequences are deduced, with regard to the limitation of estates at common law.

*Challis, Real Property (*181).*

By the common law, upon the death of a person entitled to an estate in fee simple, the lands (unless subject to a special custom of devise) necessarily descended to the person next entitled as heir. After the passing of the Statute of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, the effect of which was completed by the conversion of all lay tenure into socage by 12 Car. 2, c. 24, such descent was liable to be prevented by a devise to a stranger; but even then if a devise were made to the person who would have taken as heir if no devise had been made, such heir took by descent and not by the devise. (Watk.

Desc. 270.) The question arises, given the rules for ascertaining the heir to a specified person, from what specified person ought heirship to be deduced upon a descent cast; and by the common law, the person from whom heirship was deduced was not the person last entitled, but the person who, under the title, had last had seisin in deed of the lands. (Co. Litt. 11b.) Such person was accordingly, at the time of a descent cast, said to be the stock (more properly, the root) of descent. A seisin in law did not suffice to make the person so seised the stock of descent. (Ibid.) This rule of descent has been superseded by the Descent Act, 3 & 4 Will, 4, c. 106, s. 2, which enacts that in every case descent shall be traced from the purchaser, that is, from the person who last acquired the land otherwise than by descent; whereby it has now become superfluous to inquire, who last had seisin in deed of the lands. By this change in the law, the importance of the distinction between seisin in deed and seisin in law has been much diminished; but it is even now not without some practical interest, and a correct apprehension of it is very necessary in examining old titles.

Seisin in deed is less properly, though conveniently, styled actual seisin; which last phrase properly denotes the seisin of the person having the immediate freehold as distinguished from the remainderman and reversioner, who are all said to be "in of the same seisin". With regard to estates of freehold in corporeal hereditaments, that is, in lands, seisin in deed is obtained when the person entitled to possession by virtue of the estate enters actually and corporally into possession of the lands, either by himself, or his bailiff; and the possession of his tenant for years, or from year to year, or at will, is in law accounted to be his possession. Therefore, if at the time of the descent cast, the lands are held by a tenant for years, the heir acquires the seisin in deed at once by the descent without entry. (Co. Litt. 15a; Watk. Desc. 66.) The possession of other persons having chattel interests only, such as tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, was also in contemplation of law, the possession of the person entitled to the freehold subject to such chattel interest, and was a sufficient possession in him to convert his seisin in law into a seisin in deed. (Watk. Desc. 64, 65.) With regard to incorporeal hereditaments which admit of estates in possession, such as a rentcharge or an advowson in gross, seisin in deed is evidenced by, and consists in, the doing of some appropriate act of ownership, such as receiving the rentcharge, or exercising the right of presentation to the benefice. With regard to estates in re-

mainder or reversion, upon an estate of freehold, which are incorporeal hereditaments in which *ex vi termini* no estate in possession is possible, and therefore no entry could be made, a seisin in deed, sufficient to make the person obtaining it the root of descent, might be obtained by exercising certain acts of ownership, such as by granting a lease for life to take effect out of the remainder or reversion, or, in the case of a reversion, by receiving the rent (if any) reserved at the creation of the precedent estate of freehold. (Watk. Desc. 108.)

Seisin in law is the seisin of the heir upon whom the estate in possession descends, or of the remainderman or reversioner whose estate has become the estate in possession by the determination of a precedent particular estate of freehold, before such heir, remainderman, or reversioner, has made an actual entry upon the lands. And similarly, in the case of incorporeal hereditaments which admit of estates in possession, such as a rentcharge or an advowson in gross, the seisin in law is in such heir, remainderman, or reversioner, before he has done any appropriate act of ownership, such as receiving the rentcharge or presenting to the benefice.

But seisin in law is only a presumption of the law, which is incompatible with, and is rebutted by, the fact that a seisin in deed, or actual seisin, is, whether rightfully or wrongfully, in anybody else. If the person actually seised by lawful title, is disseised by a disseisor, the person disseised has not a seisin in law, but only a right of entry. So if, before the entry of the heir, a stranger should (wrongfully) enter in fact upon the lands,—which wrongful entry was technically styled an abatement, and the stranger so entering an abator,—the heir no longer has a seisin in law, but only a right of entry. And if, before the entry of the remainderman, or the reversioner, a stranger should in like manner enter,—which entry was technically styled an intrusion, and the stranger an intruder,—the remainderman or reversioner no longer has a seisin in law, but only a right of entry. The distinction between a right of entry and a seisin in law is, that a right of entry implies *ex vi termini* that the actual seisin is (wrongfully) in somebody else, while a seisin in law implies that that is no actual seisin in anybody. But an actual entry, which would suffice to turn a seisin in law into a seisin in deed, is also sufficient to turn a right of entry into a seisin in deed.

The existence of a seisin in law is sufficient to prevent the seisin, or immediate freehold, from being vacant. This is evident from the fact, that the creation of successive estates necessarily contem-

plates the existence of a seisin in law only, upon the determination of the particular estate in possession. For if a seisin in law were insufficient to prevent an abeyance of the immediate freehold, all creation of successive estates would, for that reason, be void by the common law.

A seisin in law is converted into a seisin in deed by making an actual entry, or entry in deed, upon the lands, such entry being expressed to be made with that intent and in that behalf. Such an entry made upon any part of the lands will give seisin in deed of all lands situate in the same county of which the person making the entry has seisin in law. An actual entry is made so soon as the person desiring to make an entry has any part of his body upon the lands; and such entry is complete and effectual, even though he should immediately afterwards be dragged off by force. (Watk. Desc. 61.)

CHAPTER III.

ESTATES IN FEE SIMPLE.

MELICK ET UX. v. PIDCOCK.

44 *N. J. Eq.* 525; 6 *Am. St. Rep.* 901; 15 *Atl.* 3. (1888)

DEPUE, J. Tunis D. Melick, on the 20th of April, 1878, made a mortgage to his father, Peter W. Melick, upon certain lands in the county of Hunterdon, which he had acquired under the will of his grandfather. The mortgage was assigned by Peter W. Melick to Fisher Pidcock, the complainant, on the 24th of July, 1884. Subsequent to the making of the mortgage, and prior to the assignment to Pidcock, to-wit, on the 15th of May, 1878, Tunis conveyed the mortgaged premises to Sarah Ann Studdiford, in trust. The deed of conveyance was an indenture of a bargain and sale between Tunis D. Melick, of the first part, and Sarah Ann Studdiford, of the second part, whereby the party of the first part, for the consideration of one dollar, did grant, bargain, sell, aliën, release, convey, and confirm all that certain interest or remainder devised to him by his grandfather in the premises unto the party of the second part, in trust nevertheless for the two children of Tunis D. Melick, Clarence and Caroline, for their use and benefit, and their heirs, as tenants in common, in equal shares and proportions; * * * it being intended by this indenture to convey the same subject only to such charges and incumbrances as by said last will and testament are set out,—it being the object of the said party of the first part to convey all his right, title, and interest therein, with the appurtenances, to have and to hold the aforesaid premises, with the appurtenances, unto the party of the second part, in trust as aforesaid for the said Clarence and Caroline Melick, their heirs and assigns, forever.

In this condition of the title, Pidcock, on the 19th of August, 1884, filed a bill to foreclose his mortgage, and for the sale of his mortgaged premises. To this bill Clarence and Caroline Melick, the *cestuis que trust*, were made parties, and filed answers. Sarah A. Studdiford

died before the bill was filed. Tunis D. Melick was not made a party, he having conveyed by the trust deed his interest in the mortgaged premises. A final decree for the sale of the mortgaged premises was made October 2, 1885. On this decree execution issued to the sheriff of Hunterdon, who made sale of the premises on the 25th of January, 1886. At this sale the complainant became the purchaser. The sale was confirmed by the court, and a deed in pursuance thereof made and delivered to the complainant. Tunis D. Melick was in possession of the mortgaged premises at the time of the foreclosure sale, and the complainant applied to the court for a writ of assistance against Tunis D. Melick to have possession of the premises delivered to him. A writ of assistance was refused, on the ground that, there being no word of inheritance in the grant to Mrs. Studdiford, upon her death the interest of the grantor devolved upon him again, and the rights of the *cestuis que trust* terminated. *Pidcock v. Melick*, 6 Atl. R. 679.

The complainant thereupon filed this bill, which is a bill of strict foreclosure, as distinguished from the usual bill for foreclosure and sale. Its prayer is that Tunis D. Melick may be decreed to pay the complainant the amount due him for principal and interest on the mortgage, and that in default thereof the said Tunis D. Melick, and all persons claiming from, or under him, may be barred and foreclosed of and from all equity of redemption in the mortgaged premises. To this bill Tunis D. Melick and Sarah M. Melick, his wife, were made parties. Mrs. Melick was made a party as the assignee of a judgment recovered on the 6th of April, 1886, by James J. Bergen against Tunis D. Melick, for a debt incurred by Tunis D. Melick prior to the execution of the complainant's mortgage. Tunis D. Melick and Sarah M. Melick both answered the bill, setting up that the complainant's mortgage was made without consideration, and with the intent to defraud creditors. Mrs. Melick further, by way of cross-bill, set up that she was also the owner of a judgment recovered by Kline Melick against Tunis D. Melick on the 4th of June, 1878, and asked a decree establishing the priority of both judgments over the complainant's mortgage for the reason above mentioned. The latter judgment was held by Peter W. Melick at the time the original foreclosure suit was begun, and he was made a party to that suit as owner of this judgment. Mrs. Melick's *status* in this suit depends, therefore, upon the judgment recovered by Bergen, and that judgment was recovered after the decree in the original suit, and after the execution sale and the sheriff's deed to the complainant.

The deed from Tunis to Mrs. Studdiford conveyed to her an estate

upon a simple trust, without any discretionary powers or active duties to be performed by the trustee. Under such a conveyance the incidents of the trust-estate are a *jus habendi*, or right of actual possession in the *cestui que trust*; and also the *jus disponendi* or, right in the *cestui que trust* to require the trustee to convey the legal estate as the *cestui que trust* may direct.—Lewin on Trusts, 18. The trust in its nature and quality is such as would be executed by the statute. Revision, p. 165. The trust, as declared in the deed, is for the use of Clarence and Caroline, and their heirs and assigns, forever; words which, in a legal estate, would create a fee. In construing the limitation of trusts, courts of equity adopt the rules of law applicable to legal estates. Cushing v. Blake, 30 N. J. Eq. 689. On the assumption that the trustee took only a legal estate for life, Clarence and Caroline took an equitable estate in fee-simple. It is clear that the equitable estate vested in them did not terminate at the death of Mrs. Studdiford even if she took by the deed only an estate for her life; for it is a maxim in equity that a trust once created shall not fail for want of a trustee, and the court will follow the estate into the hands of the legal owner, whoever he may be, and compel him to give effect to the trust by the execution of proper assurances, unless the legal estate has gone to a *bona fide* purchaser for value. 2 Lewin, Trusts, 833. In Weller v. Rolason, 17 N. J. Eq. 13, the testator directed his executor to invest the residue of his estate in the purchase of a house and lot to belong to his widow during her widowhood, and on her death to be sold and the proceeds equally divided among his children. The executor made the purchase, and took a deed to himself, as executor, without words of inheritance. The executor and the widow having died, on a bill filed by the testator's children, to have the lands applied to the purposes of the trusts declared in the testator's will, a decree was made against a purchaser from the grantor's heirs, having knowledge of the trust, that a conveyance be made in fee, and that the lands be sold, and the proceeds be applied to the trusts declared in the testator's will.

If Mrs. Studdiford took only a life-estate by the deed, and the legal title reverted to the grantor on her death, the trust-estate in his children was not thereby destroyed. The lands would remain in the grantor's hands charged with the trust. Nor did the trust deed, upon a construction of all the limitations contained in it, grant to Mrs. Studdiford only an estate for life.

It is undoubtedly the common-law rule that an estate of inheritance cannot be created by deed without the word "heirs." In a will, an es-

tate of inheritance may pass, without the word "heirs," for in a will a fee-simple doth pass by the intent of the devisor; but in feoffments and grants the word "heirs" is the only word that will make an estate of inheritance. Co. Litt. 8b, 96. The rule of the common law that, in the creation of an estate by deed, the word "heirs" is necessary to pass the fee, has not been altered in this state by statute, nor has it been modified or relaxed by judicial construction. No synonym can supply the omission of the word "heirs," nor can the legal construction of the grant be affected by the intention of the parties. *Kearney v. Macomb*, 16 N. J. Eq. 189; *Adams v. Ross*, 30 N. J. Law, 505; *Sisson v. Donnelly*, 36 N. J. Law, 433, 434. But it is also a maxim of the highest antiquity in the law that all deeds shall be construed favorably, and as near the apparent intention of the parties as is possible, consistent with the rules of law. 4 Cruise, Dig. 272. To create a fee, the limitation must be to "heirs;" but it may be either in direct terms, or by immediate reference, and it is not essential that the word "heirs" be located in any particular part of the grant. 4 Kent, Comm. 6; 2 Prest. Est. 2; Shep. Touch. 101; Com. Dig. "Estate," 10, (A 2;) 3 Bac. Abr. 425, "Estate," B. In *Doe v. Martin*, 4 Term R. 39-65, the deed of settlement was "to the use of all and every the child or children of a marriage, equally, share and share alike. If more than one, as tenants in common, and not as joint tenants; and, if but one child, then to such only child, his or her heirs and assigns, forever." The words "his or her heirs," considering, as was said by Lord KENYON, "the whole settlement and the manifest intention of the parties," were allowed to operate as words of limitation on all the preceding words of the sentence.

Conveyances to uses are construed in the same manner as deeds, deriving their effect from the common law. 4 Cruise, Dig. 258. The word "heirs" is necessary to create a fee. But, where the conveyance is in trust, the trustee will take the legal estate in fee, although limited to him without the word "heirs," if the trust which he is to execute be to the *cestui que trust* and his heirs. The words of limitation and inheritance in such case are connected with the estate of the *cestui que trust*, but are held to relate to the legal estate of the trustee, because without such construction the trustee would not be able to execute the trust. 1 Washb. Real Prop. 57; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Metc. 32; *Cleveland v. Hallett*, 6 Cush. 404; *Welch v. Allen*, 21 Wend. 147; *Neilson v. Lagow*, 12 How. 98-100; *North v. Philbrook*, 34 Me. 532. *Stearns v. Palmer*, *supra*, is very like the present case. By a deed of bargain and sale lands were conveyed

to A., B., and C., in trust for the inhabitants of the parish of S., for a burying-ground, forever; "to have and to hold the said lands to the said A., B., and C., in trust for the use of the inhabitants of said parish and their heirs, forever, as a burying-yard." It was held that the deed conveyed to A., B., and C. a fee-simple estate. WILDE, J., said: "The words 'their heirs' in the deed may be construed as applied to the immediate grantees, and ought to be so construed to effectuate the clear intention of the parties."

The rule of construction adopted in the foregoing cases applies as well to a grant upon a simple trust as to grants with special powers or active duties in the trustee, and is not a whit more liberal than that adopted by the king's bench in *Doe v. Martin*, in the construction of successive limitations, to effectuate the manifest intention of the parties. Conveyances upon simple trusts are regarded in law as grants for the benefit of the *cestui que trust*. In every such conveyance the intention of the grantor is to give the *quantum* of the estate limited in the declaration of use. The estate of the trustee and the use limited upon it are parts of one entire conveyance, the trustee's estate being subsidiary to the purposes of the trust. A construction which will apply words of inheritance in the trust to the trustee's estate is absolutely necessary to give effect to the intent of the grantor. Our statute, which extends to every person to whom the use of lands is given, granted, limited, released, or conveyed by deed, grant, or any other legal conveyance whatsoever, and converts the equitable estate into a legal estate, should have great weight, if not a controlling effect, upon the construction of a deed to uses within its purview. Revision, p. 165, par. 66. A use expressed in words of inheritance demonstrates that the grantor, by his deed, intended to convey a fee. The statute declares that the grantees to whom the use is given, limited, granted, or conveyed shall be deemed in as full and ample possession, to all intents, construction, and purposes, as if such grantees, their heirs and assigns, were possessed thereof by solemn livery of seizen and possession. Unlike the English statute of uses, (27 Hen. VIII. c. 10,) our statute acts upon the use granted, without referring to the trustee's estate, and converts the former into a legal estate.

There is nothing in *Adams v. Ross* or *Kearney v. Macomb* contrary to this view. In *Adams v. Ross* the word "heirs" was neither in the granting part of the deed or in the *habendum*. It was found only in the covenants for title annexed to the grant. Covenants of warranty or for title are mere incidents of the grant, designed for indemnity or security

for the estate granted. They can neither enlarge nor narrow the grant, and will themselves be restrained and limited to the estate conveyed. Com. Dig. "Estate," 10, (A 2;) *Clanrickard v. Sidney*, Hob. 273; *Seymour's Case*, 10 Coke, 97; *Rawle, Cov.* 199, 415-524. The decision in *Adams v. Ross*, in this court, was expressly put upon the ground that covenants for title were no part of the conveyance. The error of the Supreme Court for which its judgment was reversed was in calling in aid covenants for title to enlarge the grant. In *Kearney v. Maccomb* the deed was to A. K. K., his legal representative and assigns, to hold the same and the proceeds thereof upon the trusts and conditions set forth in an antenuptial contract. Neither the deed nor the antenuptial contract contained the word "heirs." In both these cases the words indispensable to create a fee in a grant was entirely wanting, and there was no room for construction. In *Weller v. Rolason* reformation of the deed was necessary. The deed did not contain the word "heirs," nor did the trust appear in any way in it. *Price v. Sisson*, 13 N. J. Eq. 168, affirmed in 17 N. J. Eq. 475, decided that a conveyance to grantees and their heirs, for the use of the grantees and their heirs, in trust for certain persons beneficially interested, did not vest the legal estate in the beneficiaries, because of the common-law rule that when a use is limited upon a use the statute executes only the first use.

In the deed to Mrs. Studdiford the first and only use declared is for the beneficiaries, Clarence and Caroline, and their heirs; and all the authorities, ancient and modern, agree that the statute executes the first use, and converts it into a legal estate, except where the powers and duties conferred upon the donee to uses are such as require in him the legal estate for their discharge.

Under the trust deed the children of Tunis took an equitable estate in fee-simple, and Mrs. Studdiford, as trustee, a legal estate in fee, and there was no estate to revert to Tunis on the trustee's death. By the statute the legal estate of the trustee became vested in the *cestuis que use*. The complainant, as purchaser under the foreclosure decree to which the children of Tunis were parties, acquired the estate of the mortgagor, and also the fee in the equity of redemption. This bill was unnecessary to perfect the complainant's title under the original foreclosure suit. Indeed, in any aspect, the prayer of the bill, which is that Tunis redeem the complainant's mortgage or be foreclosed, is inappropriate. If any relief by bill was needed, the prayer should have been that Tunis convey to the complainant as owner of the equitable estate, and a decree for a conveyance would have been as of course.

A decree dismissing the complainant's bill for this reason would be inequitable. The defendants' opposition to the allowance of a writ of assistance on the ground that the complainant's title under the foreclosure was imperfect, and the denial of the writ for that reason cast a cloud upon the complainant's title. The defendants did not demur or object to the bill. The complainant made Mrs. Melick a party to this suit. By her answer and a cross-bill she set up that the mortgage held by the complainant was made by her husband without consideration, for the purpose of defrauding his creditors. The complainant answered the cross-bill, joining issue on the allegations in it. The bill may and should, under the circumstances, be treated as a bill by the complainant to remove a cloud upon his title.

The master found against the defendants on the merits, and advised a decree for the complainant. The burden of proof is upon the defendants. The testimony is conflicting and unsatisfactory, and in some respect unreliable. The evidence was taken orally, in the presence of the master, with opportunity to see and observe the demeanor of the witnesses. On a consideration of the whole case, as presented by the testimony, I find no reason to reverse the finding of the master, and the decree advised by him should be confirmed.

Note: Where it was the intention of the parties to convey a fee and the omission of the word "heirs" was through mistake a court of equity will on a proper showing reform the deed to correspond with the intention. *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390.

DOE v. CONSIDINE.

6 Wall. (U. S.) 458, *Infra*, p. 314.

WRIGHT v. DENN.

10 Wheat. U. S. 204; 6 L. Ed. 303. (1825)

Error to the Circuit Court of New Jersey. This was an action of ejectment brought in the court below. The sole question arising upon the state of facts in the cause, was upon the construction of the will

of James Page, made on the 15th of February, 1774. By that will, after the usual introductory clause, the testator proceeds as follows:

"Item, I give and bequeath unto my beloved sister, Rebecca, one hundred pounds, proclamation money, to be paid in four years after my decease.

"Item, I give and bequeath unto my beloved sister Hannah, the sum of fifty pounds, proclamation money, to be paid when she is of age.

"Item, I give and bequeath unto my sister Abigail, the like sum of fifty pounds, proclamation money, to be paid when she arrives at age.

"Item, I give and bequeath unto my loving wife Mary, all the rest of my lands and tenements whatsoever, whereof I shall die, seised, in possession, reversion or remainder, provided she has no lawful issue.

"Item, I give and bequeath unto Mary, my beloved wife, whom I likewise constitute, make, and ordain, my sole executrix of this my last will and testament, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed: and I do hereby utterly disallow, revoke, and disannul all and every other former testaments, wills, legacies, and bequests, by me in any ways before named, willed and bequeathed, ratifying and confirming this, and no other, to be my last will and testament. And I make my loving friend, Henry Jeans, of the county and province aforesaid mentioned, executor of this my will, to take care and see the same performed, according to my true intent and meaning; and for his pains," (leaving the sentence incomplete.) "In witness whereof", &c. (in the common form of attestation). The testator was seised of the land in controversy at the time of the will, and died seised, without issue, on the 10th day of October, 1774, leaving his wife Mary, the devisee, who, afterwards, married one George Williamson, by whom she had lawful issue still living, and died in the year 1811. The lessor of the plaintiff is the brother of the testator, and his only heir at law. The defendant claims title to the premises as a purchaser under Mary, the wife of the testator.

MR. JUSTICE STORY delivered the opinion of the court; and, after stating the case, proceeded as follows:

The principal question arising in this case is, what estate Mary, the wife of James Page, took under his will; whether an estate for life, or in fee. If the former, then the judgment of the Circuit Court is to be affirmed; if the latter, then it is to be reversed. * * *

We may, then, proceed to the consideration of the will of James Page, inasmuch as that of his father affords no light to guide us in the construction. The grounds mainly relied on to establish that Mary, the wife of the testator, took a fee, are, that the legacies given to his sisters are a charge on his real estate in the hands of his widow; that all the rest of his "lands and tenements," in possession, reversion, or remainder, are given; that the devise is subject to the proviso, "that she has no lawful issue," which is not a condition merely, but a substitution for an estate intended for his children; and, finally, that the lands, &c. are devised to her "freely to be possessed and enjoyed," which words are best satisfied upon the supposition of a fee.

Before proceeding to the particular examination of the legal effect of these different clauses in the will, it is necessary to state, that, where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say a plain intention, because, if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient, that the court may entertain a private belief that the testator intended a fee. It must see, that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favoured by its policy; and though the testator may disinherit him, yet the law will execute that intention only, when it is put in a clear and unambiguous shape.

In the present case, there is no introductory clause in the will, expressing an intention to dispose of the whole of the testator's estate. Nor is it admitted, that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause, as *per se* to enlarge the latter to a fee, where the words would not ordinarily import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of *Frogmorton v. Wright*, 2 W. Bl. 889; *Right v. Sidebottom*, Dougl. 759; *Child v. Wright*, 8 D. and E. 64; *Denn v. Gaskin*, Cowper 657; *Doe v. Allen*, 8 D. and E. 497; and *Merson v. Blackmore*, 2 Atk. 341; are full to the point. The most that can be said is, that where the words of the devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause, to assist them in ascertaining the intention. The case of *Hogan v. Jackson*, Cowper 297, admits this doctrine. That case itself did not

turn upon the effect of the introductory clause, but upon the other words of the will, which were thought sufficient to carry the fee, particularly the words, "all my effects, both real and personal." The case of *Grayson v. Atkinson*, 1 Wils. Rep. 333, admits of the same explanation; and besides, the inheritance was there charged with debts and legacies.

There is no doubt, that a charge on lands may be created, by implication, as well as by an express clause in a will. But then the implication must be clear upon the words. Where is there any such implication in the present will? The testator has not disposed of the whole of his personal estate, which is the natural fund for the payment of the legacies; *non constat*, how much or how little he left. For aught that appears, the personal estate may greatly have exceeded all the legacies; and if it did not, that would be no sufficient reason to charge them on the land. It is not a sound interpretation of a will, to construe charges, which ordinarily belong to the personalty, to be charges on the realty, simply because the original fund is insufficient. The charge must be created by the words of the will. Now, from what words are we to infer such a charge in this case? It is said, from the words "all the rest," but, "all the rest" of what? Certainly not of the personal estate, because the words immediately following are "of my lands and tenements," which exclude the personalty. The words, "all the rest," have then no appropriate meaning in reference to the personal estate, for the connexion prohibits it. Can they then be supposed to import "all the rest of my lands, &c. after payment of the legacies," and so be a charge on them? This would certainly be going much farther than the words themselves authorize, and much farther than any preceding clause requires, or justifies. A charge of legacies on land would not be a devise of the real estate in the ordinary understanding of men, nor in the contemplation of law. It would make them a lien on, and payable out of, the land; but it would still be distinguishable from an estate in the land. But it is sufficient for us to declare, that we cannot make these legacies a charge on the land, except by going beyond, and not by following, the language of the will. We must create the charge, and not merely recognize it. The case of *Markant v. Twisden*, Gilb. Eq. Rep. 30, was much stronger than the present. There the testator had settled all his freeholds on his wife for life, as a jointure; and by his will he bequeathed several legacies, and then followed this clause, "all the rest and residue of my estate, chattels, real and personal." I give to my wife, who I make sole executrix. But

the court held, that the wife did not take the reversion of the jointure by the devise; for as the testator had not in the preceding part of the will devised any real estate, there could be no residue of real estate, on which the clause could operate.

But, admitting that the present legacies were a charge on the lands of the testator, this would not be sufficient to change the wife's estate into a fee. The clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment in case the estate is construed but a life estate, since the estate is taken subject to the encumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his payments, and thus he may sustain a serious loss. All the cases turn upon this distinction. *Canning v. Canning*, Moseley's Rep. 240; *Loveacres v. Blight*, Cowp. Rep. 352; *Denn ex dem. Moor v. Mellor*, 5 D. and E. 558, and 2 Bos. and Pull. 227; *Doe v. Holmes*, 8 D. and E. 1; *Goodtitle v. Maddem*, 4 East's Rep. 496; all recognize it. And *Doe and Palmer v. Richards*, 3 D. and E. 356, proceeds upon it, whatever exception may be thought to lie to the application of it in that particular case. We are then of opinion, that there is no charge of the present legacies on the land; and, if there were, no inference could be drawn from this circumstance to enlarge the estate of the wife to a fee, since they are not made a personal charge upon her.

The next consideration is, whether the words, "all the rest of my lands and tenements," import a fee. In the first place, this clause is open to the objection, that it is not a residuary clause in the will, for no estate in the lands is previously given, and consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere *residuum* of interest. And if a devise of "all the rest and residue of lands," in a clear residuary clause, was sufficient to carry a fee by their own import, it would follow, that almost every will containing a residuary clause, would be construed, without words of limitation, to pass a fee. Yet, the contrary doctrine has most assuredly been maintained. In *Canning v. Canning*, Moseley, 240, the testator devised as follows: "all the rest, residue and remainder of my messuages, lands, &c., after my just debts, legacies, &c., are fully satisfied and paid, I give to my executors in trust for my daughters,"

and the question was whether these words passed an estate in fee, or for life, to the executors. The court decided that they passed a life estate only. The authority of this case was fully established in *Moor v. Denn, ex dem. Mellor*, 2 Bos. and Pull. 247, in the house of lords, where words equally extensive occurred; and the authority of this last case has never been broken in upon. * * *

It may also be admitted, that the words "lands and tenements," do sometimes carry a fee, and are not confined to a mere local description of the property. But, in their ordinary sense, they import the latter only. And when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention of the testator to use them in such extensive signification. The cases cited at the bar reach to this extent, and no farther. Their authority is not denied; but their application to the present case is not admitted.

We may, then, take it to be the general result of the authorities, that the words, "all the rest of my lands," do not, of themselves, import a devise of the fee; but, unless aided by the context, the devisee, whether he be a sole or a residuary devisee, will, if there be no words of limitation, take only a life estate. * * *

Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures.

Judgment affirmed, with costs.

WILLIAM H. McCaffrey ET AL. v. LIZZIE C. MANOGUE
ET AL.

196 U. S. 563; 49 L. Ed. 600; 25 Sup. Ct. 319. (1905)

The question involved in this case is the construction of the will of Hugh McCaffrey, deceased. It was duly admitted to probate, and recorded in the Supreme Court of the District. It is as follows:

"Washington, District of Columbia,

April Thirtieth, 1896.

"In the name of God, being now in good health and sound in mind

and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

"I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5 in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetery.

"I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

"To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

"To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street, N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

"2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number twenty (20) in square eight hundred and forty-one (841), also my horse and buggy.

"And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street, S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

"To my grandson Joseph Quigley, I give and bequeath my watch and chain.

"I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

"All the real estate herein described is located in the city of Washington, District of Columbia.

Hugh McCaffrey. [Seal.]"

The devisees in the will were the only heirs of the testator.

On the 10th of July, 1897, Mary A. Quigley died, leaving surviving four children, the appellants Catherine L., Margaret, Mary and

Joseph Quigley. Edward Quigley, her husband, also an appellant, survived her. She left a will, which was duly admitted to record, by which she devised all her estate to Catherine L. and Edward Quigley, in trust for her children. Francis T. McCaffrey, son of Hugh, and one of the devisees in the latter's will, died October 20, 1898, leaving as heirs at law his brothers and sisters, the children of his deceased sister, Mary A. Quigley, and his nephew, Frank Foley. He left a will, by which he devised and bequeathed all of the property to his sister, Lizzie C. Manogue, and his brothers William A. and James B. McCaffrey, "absolutely and in fee simple, according to the nature of the property, as tenants in common, but not as joint tenants." At the time of his death he was seized and possessed of the real estate devised to him by his father.

James B. McCaffrey has sold and conveyed the lot devised to him to the respondent George W. Manogue. Upon an attempt to sell the property devised by Francis T. McCaffrey, a doubt was raised as to the extent of the interest devised to him and the other devisees by the will of H. McCaffrey,—whether an estate for life or in fee simple. This suit was brought "to have it determined what estate each of the said devisees took thereby, and to have their title quieted as against any person or persons who may claim adversely to the same as heirs of said Hugh McCaffrey, or under such heirs."

It was decreed by the trial court that only life estates were devised by the will, and the decree was affirmed by the court of appeals. 22 App. D. C. 385.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court:

It will be observed that the devises are expressed in exactly the same way. To Mary A. Quigley, however, there are given several pieces of real estate, the money of the testator in bank, and his building association stock. She is charged with the payment of the testator's funeral expenses and debts; also with the care of his cemetery lot. Nevertheless, neither of the lower courts distinguished between the devisees,—to all was applied the rule of law that a devise of land, without words of limitation or description, gives a life estate only. The court of appeals held that the charge or burden upon Mary A. Quigley to pay the funeral expenses and debts of the testator was offset by the gift to her of personal property. It is insisted that the ruling is contrary to the decision in *King v. Ackerman*, 2 Black, 408, 17 L. ed. 292. It is there said: "The rule of law which gives a fee where the devisee is charged with a sum of money is a

technical dominant rule, and intended to defeat the effect" of the artificial rule established in favor of the heir at law, that an indefinite devise of land passes nothing but a life estate. It was, however, apparent to the court of appeals that to follow *King v. Ackerman* would not execute the intention of the testator by opposing one technical rule by another, but would discriminate between his heirs, and destroy the equality between them which it was the purpose of the will to create. To effect this equality the court selected not the "dominant rule," whose virtue this court pointed out, but the other, regarding it the most commanding. It is altogether a strange tangle of technicalities. Apply either of them or both of them, and we defeat the intention of the testator. Are we reduced to this dilemma? We think not; nor need we dispute the full strength of the rule in favor of the heir at law. It is not an unyielding declaration of law. It cannot be applied when the intention of the testator is made plain. It cannot be applied when the purpose of the testator, as seen in the will, cannot be carried out by a devise of a less estate than the fee. *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. The policy of the law in favor of the heir yields, we repeat, to the intention of a testator if clearly expressed or manifested. That policy, the reason for it and the elements of it, is expressed strongly by Mr. Justice Story in *Wright v. Denn*, 10 Wheat. 204, 227, 228, 6 L. ed. 303, 309:

"Where there are no words of limitation to a devise, the general rule of law is that the devisee takes an estate for life only, unless, from the language there used or from other parts of the will, there is a plain intention to give a larger estate, we say, a plain intention, because if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put *in a clear and unambiguous shape.*" (Italics ours.)

We think the intention of McCaffrey is "put in a clear and unambiguous shape." He intended to dispose of his whole estate. It is true there is no introductory clause expressing such intention, but here is no residuary clause indicating that he intended to pass less than all of his estate. And all of his heirs at law were his devisees.

In other words, the very heirs for whom the rule is invoked are those among whom he distributed his property, and surely he intended a complete distribution,—to vest in each the largest interest he could give, not assigning life estates with residuary fees to the very persons to whom such life estates were devised. In other words, making each heir the successor of the other and of himself. It was evident to the court of appeals—it is evident to us—that he intended to make his heirs equal. Of this purpose the charge upon his daughter, Mary A. Quigley, is dominantly significant, not only in effect but, in its expression. She is given a greater quantity of real estate than the other devisees. She is given personal property besides; but, declared the testator, “she is to pay funeral expenses and other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery.” That charge was not intended to enlarge the quantity of interest in the real estate devised in the sense contended for, but to make an equality between her and the other heirs and devisees, and, we repeat, that was his especial purpose. In other words, he gave her more property, not a larger interest in it. The devise to his grandson, Frank Foley, shows how carefully the testator regarded his heirs. Surely, as he regarded that grandchild as inheriting the rights which his mother might have inherited, he did not intend a disposition of his property which precluded his other grandchildren of inheriting through their parents. And this will be the result if the appellees are right. No devisee possesses an estate which can be devised to or inherited by his or her children.

Against the effect of the heirs at law of the testator being also his devisees, it may be said that it has been held that, though a testator has given a nominal legacy to his heir, or declared an intention to wholly disinherit him, the inflexibility of the rule in favor of the heir has been enforced. *Frogmorton v. Wright*, 2 W. Bl. 889; *Roe d. Callow v. Bolton*, 2 W. Bl. 1045; *Right v. Sidebotham*, 2 Dougl. 730; *Roe d. Peter v. Daw*, 3 Maule & S. 518.

In *Right v. Sidebotham*, Lord Mansfield felt himself constrained to enforce the rule, but he observed in protest: “I verily believe that, in almost every case where by law a general devise of land is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation or words tantamount are necessary to pass an estate of inheritance.” And he hence concluded that words tending to disinherit the heir at law, unless the estate is given to some

one else were not sufficient to prevent the heir from taking.

Lord Ellenborough, in *Roe v. Daw*, followed the rule, and declared also that he thereby probably defeated the intention of the testator. It is a strange conclusion from the facts, and needs the sanction of those great names to rescue it from even stronger characterization. Lord Mansfield spoke in 1781, Lord Ellenborough in 1815. We cannot believe, if called upon to interpret a will made in 1896, when the rights of heirs are not so insistent, and the rule in their favor lingers, where it lingers at all, almost an anachronism,—when ownership of real property is usually in fee, and when men's thoughts and speech and dealings are with the fee,—they would hold that the purpose of a testator to disinherit his heirs could be translated into a remainder in fee after a devise of a life estate to another.

But, perhaps, even the severe technicality of those cases need not be questioned. In the construction of wills we are not required to adhere rigidly to precedents. We said in *Abbott v. Essex Co.*, 18 How. 202, 213, 15 L. ed. 352, 355:

"If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

To like effect is *Cook v. Holmes*, 11 Mass. 528, where the will passed on contained the following devise: "*Item.* To his grandson Gregory C., only child of his son Daniel C., deceased, a certain piece of land in Watertown, containing about 6 acres." The will contained devises to other sons of pieces of real estate, charging them with payment of certain legacies. The will concluded as follows: "The above-described legacies, together with what I have heretofore done for my children and grandchildren, make them nearly equal, and are their full portions of my estate."

The will, therefore, is similar to the will in the case at bar. Equality between the devisees is as much the purpose of one as the other, though it is expressed in one and deduced as an implication in the other. Chief Justice Parker, in delivering the opinion of the court said: "The quality of the estate which Gregory C. took by the devise must be determined by the words of the will, taken together, and receiving a liberal construction, to effectuate the intention of the testator as manifested in the will."

Further: "The words of the particular devise to Gregory, considered by themselves, certainly give no inheritance." And stating the rule of law to be, as contrasted with the popular understanding, "that such a devise, standing alone, without any aid in the construction from other parts of the will, would amount only to an estate for life in the devisee," added:

"But it is too well established and known to require argument or authorities now to support the position that devises and legacies in a will may receive a character, by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise; [cases were cited in note] and this because the sole duty of the court in giving a construction is to ascertain the real intent and meaning of the testator, which can better be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty than by confining their attention to one isolated paragraph, probably drawn up without a knowledge of technical words, or without recollecting the advantage of using them."

The devise to Gregory C. was held to be of the fee.

From these views it follows that *the decree of the Court of Appeals must be, and it is, reversed*, and the case is remanded to that court with directions to reverse the decree of the Supreme Court, and remand the case to that court, with directions to enter a decree in accordance with this opinion.

STATE OF GEORGIA v. TRUSTEES OF CINCINNATI
SOUTHERN RY. ET AL.

248 U. S. 26; 63 L. Ed. 104; 39 Sup. Ct. 14. (1918)

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in this court by the State of Georgia to prevent the defendants from longer occupying or using any portion of the right of way of the Western & Atlantic Railroad, a railroad built and owned by the plaintiff state. The question, although argued at considerable length is a very short one. On October 8, 1879, the state passed an Act sufficiently explained by its contents.¹ On August 21, 1916, reciting that the Cincinnati Southern Railway now is controlled by a competitor of the Western & Atlantic road

and that the Western & Atlantic needs the space, Georgia undertook to repeal the former Act and to treat it as giving a license only, that the state was free to revoke. The defendants say that the words "there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right of way of the Western & Atlantic Railroad" &c., grant a right of way in fee.

The Ohio statute under which the Cincinnati Southern Railway was constructed by the City of Cincinnati provided for a board of trustees to be appointed and kept filled by the Superior Court of the city, to have control of the fund raised by the city, and to acquire and hold all the necessary real and personal property and franchises either in Ohio or in any other state into which the line of railroad should extend. Therefore the grant to the trustees was the proper form for a grant in effect to the Railway, as it was styled in the title of the Georgia act, or to the city if the city was in strictness the *cestui que trust*. No other facts of much importance appear. Considerations are argued on behalf of Georgia to show that the motives for a perpetual grant were weak, but nothing that affects the construction of the words used or that shows that they are not to be given their ordinary meaning, as indeed the argument for the plaintiff agrees. But if that be true, *cadit questio*. A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words, and a grant of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need words of succession to be perpetual. The words "and its successors" or "in fee" would not enlarge the content of a grant to a corporation. *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 66, 33 Sup. Ct. 988, 57 L. ed. 1389; *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. ed. 592; *Great Northern Ry. Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 5 De G. & Sm. 138, 146. If a grantor wishes to limit the effect of words sufficient on their face to convey a fee it should express the limitation on the instrument. The purpose of the grant in this case, to supply a roadbed for a trunk line, necessitating considerable expenditure on the part of the grantee, confirms, if confirmation were required, the legal effect of the words unexplained. *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, 663, 32 Sup. Ct. 572, 56 L. ed. 934; *Llanelly Ry. & Dock Co. v. London & Northwestern Ry. Co.*, L. R. 8 Ch. 942, 950; *Great Northern Ry.*

Co. v. Manchester, Sheffield & Lincolnshire Ry. Co., 5 De G. & Sm. 138.

We think it unnecessary to refer to the language in detail beyond saying that there is nothing in the statute to suggest an intent to limit the scope of the grant and that such expressions as "provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right of way shall always be the same as that of the Western & Atlantic Railroad," further confirm our interpretation, as does also the requirement of the consent of the lessee "as to the term of their lease," since those words imply that that grant is of something more that does not require their assent. Elaborate discussion of the circumstances seems to us superfluous. But it is necessary to mention the objection that by the Constitution of Georgia the general assembly was forbidden to "grant any donation or gratuity in favor of any person, corporation or association," and that there was no consideration for this grant. Even if the contemplated and invited change of position on the part of the Cincinnati Southern Railway and the benefit of the state expressly contemplated as ensuing from it were not the conventional inducement of the grant, and so, were not technically a consideration, we are of the opinion that the grant was not a gratuity within the meaning of the State Constitution. A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the Constitution intended to prevent and in our opinion is not within the meaning of the word as it naturally would be understood. We deem further argument unnecessary to establish that the State of Georgia made a grant which it cannot now revoke.

Bill dismissed.

¹ An Act granting right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western & Atlantic Railroad.

Section 1. Be it enacted by the General Assembly of the State of Georgia, That whereas the city of Cincinnati has nearly completed the Cincinnati Southern Railway, a grand trunk line which will be of great benefit to the State of Georgia forming a most important feeder and practically an extension of the Western & Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West;

And Whereas, said railway reaches the Western & Atlantic Railroad at Boyce's Station, and for the most of the distance to the termini of the two railroads in Chattanooga, their routes run parallel to and adjoining each other; a distance of about five miles;

And Whereas, it is to the advantage of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed and facilitating railroad operations; and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Ten-

nessee River; there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right of way of the Western & Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and a half feet westerly from the center of the track of the Western & Atlantic Railroad, so as to admit of laying track, if desired, near enough to the track of the Western & Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet: Provided always, that this grant is subject to the consent and approval of the lessees of the Western & Atlantic Railroad as to the term of their leave: Provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right-of-way shall always be the same as that of the Western & Atlantic Railroad.

Sec. 2. Be it further enacted, That all Acts and parts of Acts inconsistent with this Act are hereby repealed.

CHAPTER IV.

ESTATES IN FEE TAIL.

- Section 1. At Common Law.
- Section 2. Under Modifying Statute.
- Section 3. By Implication.

SEC. 1. AT COMMON LAW.

Litt. Sect. 13.

Tenant in fee taile is by force of the statute of W. 2. cap. 1. for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall, and tenant in taile speciall.

Co. Litt. 19a.

Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes; First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue: for if the donee had issue and died, and the land had descended to his issue, yet if that issue had dyed (without any alienation made) without issue, his collateral heire should not have inherited, because he was not within the forme of the gift, viz. heire of the body of the donee. Lands were given before the statute in frankmarriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collaterall issue

should not inherite, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though they were divers descents.

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam doni*. And so if land, had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common law; for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law, and is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor. But if *feme* tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formdon in descender*; for the alienation was not lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remaine at the common law. If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatum* might have aliened as well as in the case of a common person. But, if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assets; but otherwise it was in the case of a common person. Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot

alter his case, nor make it greater than the donor gave unto him; and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships and other profits of their seignories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth us.

ATTORNEY GENERAL, v. MARLBOROUGH.

3 *Madd.* 498.—531. (1818)

* * * That an ordinary Tenant in Tail may, at his pleasure, cut down all timber for whatever purposes planted, admits of no question, and it is hardly necessary to advert to the origin of that particular species of tenure. It grew out of the ancient conveyances to a man, and the heirs of his body. Under such a conveyance, it was held at common law, that until issue born he had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body, but the moment that issue was born, the condition being performed, the estate became absolutely his property and he could dispose of it in the same manner as if he had held it in fee-simple. The legislature, however, thought fit to interfere, and by the Statute of Westminster II, (commonly called the Statute De Donis, 13 Edward I, c. 1.) it was declared, that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body, should descend to the issue, and that he should not have power to alienate the estate. In the construction of that act of Parliament it was held that a tenant in tail remained with the same unqualified and absolute ownership of his estate as he had before that statute, with the single exception of the restraint on alienation. * * *

SEC. 2. UNDER MODIFYING STATUTE.

DOTY v. TELLER.

54 N. J. Law, 163; 33 Am. St. Rep. 670, 23 Atl. 944. (1891)

Ejectment. Daniel Wade, after executing the will in question, died seised of the land in dispute and after the death of his wife Abigail, Daniel Wade Teller entered into possession of such land devised to him. He afterwards executed a deed thereof to one Smith, purporting to convey in fee with covenants or seisin and warranty. Doty, the plaintiff, claims under the conveyance to Smith, while the defendants in error claim as the heirs of said Teller.

The Chancellor. A single question is presented by the error assigned in this case. It is, whether Daniel Wade Teller took a fee or merely an estate for life under the will of Daniel Wade. That will devises the land in question, after the death of the testator's wife, "to him and to his heirs entail the same forever." Its construction must depend upon the force or effect which is to be accorded to the words "entail the same." Without those words the devisees would clearly take the lands devised in fee. Their natural import, in the connection in which they are used, is to condition or qualify the fee that is given. The effect designed by them is expressed by the word "entail", the well recognized import of which is to restrain the fee to heirs of the body of the donee to the exclusion of collateral heirs, and to imply a condition that if the donee dies without lineal heirs the land shall revert to the donor. After the enactment of the statute of Westminster II, 13 Edw. I., commonly called *de donis conditionalibus*, the conditional fee was by judicial construction resolved into a particular estate known as a fee tail: Den v. Spachius, 16 N. J. L. 172.

Lands held by that estate were commonly said to be entailed. As the word "heirs" is necessary to the creation of the fee simple by deed, so the additional word "body", or some other word of procreation, was necessary to create a fee tail by such an instrument. But in wills, where the cardinal rule of construction is that the testator's manifest intention shall prevail over all forms of expression, these correct and technical words have never been considered essential. Any expressions in the will denoting an intention to give the devisee an estate of inheritance descendible to his, or some of his, lineal, but not collateral, heirs, have always been regarded as a sufficient

devise of a fee tail: 3 Jarman on Wills, R. & T. ed., 89; 1 Washburn on Real Property, 109; 2 Bla. Com., 115; Den v. Fogg, 3 N. J. L. 819; Somers v. Pierson, 16 N. J. L. 181; Den v. Cox, 9 N. J. L. 10; Den v. Fox, 10 N. J. L. 39; Weart v. Cruser, 49 N. J. L. 475.

In the devise in question the purpose of the testator is very plainly manifested. He meant to create an estate tail. Being at a loss for the correct and technical language to express it, instead of saying, "to Teller and the heirs of his body forever," he said, "to Teller and his heirs, entail the same, forever," specifying the result he wished to reach as plainly as though in giving a fee simple he had so said, in place of using the word "heirs." It is not perceived how any other conclusion as to his intention can be reached without rejecting the words "entail the same" as meaningless surplusage. Nothing in the context of the will justifies such a rejection. All other expressions in the instrument are plainly pertinent to the subject matter dealt with and necessary to signify the testamentary purpose, exhibiting a capacity in the testator to clearly and concisely express his intentions.

When the will was drawn estates tail existed in this state, recognized and regulated by the statute of August 26, 1784: P. L. p. 53, explained by the act of March 23, 1786: P. L., p. 78. They could be created by devise, to exist during the life of the devisee and to descend at his death to his heirs according to the rules of descent at the common law. But the instant the first descent was cast, that instant the estate was enlarged into a fee simple: Den v. Fogg, 3 N. J. L. 819; Den v. Fox, 10 N. J. L. 39; Den v. Spachius, 16 N. J. L. 172; Den v. Baldwin, 21 N. J. L. 395.

By statute of the 13th of June, 1820, P. L., p. 178, estates tail were abolished, and it was provided that a devise which, under the statute 13 Edw. I., would be held to create an estate tail, should vest an estate for life only in the devisee and a fee simple in his children, equally, as tenants in common, the children of a deceased child taking their parent's interest: Rev. p. 299, sec. 11. At the death of Daniel Wade, after the latter statute went into effect, the will in question first spake, and hence Daniel Wade Teller took only an estate for life. At his death the defendants in error became entitled to recover possession of the *locus in quo*.

We find no error, and therefore affirm the judgment below.

DENGEL ET AL. v. BROWN.

1 App. D. C. 423. (1893)

The Chief Justice delivered the opinion of the court:

This is an action of ejectment brought against the defendant by the children answering to the description of heirs-at-law of Mary Ann Dengel, deceased, to recover part of lot No. 13, in square 400, in the city of Washington. The case comes before the court on an agreed statement of facts and the only questions for decision are, first, as to the true construction of a deed from Sarah Moore to Joseph F. Hodgson, dated the 11th day of March, 1868; and, second, as to the true construction of the will of said Sarah Moore, dated the 3d of April, 1868, and admitted to probate on the 16th of October, 1869. * * *

Then, as to the construction of the will of Mrs. Moore. By this will the testatrix gave and devised to Mary Ann Dengel the part of lot No. 13, in square 400, (the same conveyed and described in the deed to Hodgson, trustee,) free and clear of and from all control of her then husband, or any other husband she might have; "the said premises at her decease to descend to her lawful heirs; and should she die without legal issue, then, and in that case, the aforesaid premises shall revert to my estate, to be disposed of as best my executors may think proper, for the carrying out my desire hereinbefore expressed, or hereinafter named." There is nothing in the after part of the will that in any way reflects upon the construction of the foregoing clause.

But for the limitation over, upon the dying of Mary Ann Dengel "without legal issue," the preceding devise to Mary Ann Dengel would be plainly a devise in fee simple. The devise to her, and at her decease "the said premises to descend to her lawful heirs," is clearly within the Rule in Shelley's Case, 1 Co., 94. This has been so ruled in many cases. *Steiner v. Kolb*, 57 Penn. St. 123; *Quillman v. Custer*, 75 Penn. St. 125; *McCray v. Lipp*, 35 Md. 116; *Andrews v. Spenlin*, 35 Md. 262; *Brown v. Lawrence*, 3 Cush., 390; *Brown v. Lyon*, 6 N. Y. 419; and see *Jarm. on Wills*, 100 to 107, and cases collected in note. But, in what follows, it appears that the word "heirs" was intended to be restricted to mean heirs of the body, or issue of the body; and, therefore, instead of a fee simple, an estate in fee tail general, according to the common law, was devised. 3 *Jarm. on Wills*, 94; *Dallam v. Dallam*, 7 H. & J., 220; *Watkins v.*

Sears, 3 Gill, 492. And this estate tail general, by operation of the Act of Maryland of 1786, Ch. 45, to direct descents, and which is in force in this District, is converted into a fee simple estate; and, consequently, Mary Ann Dengel took by the devise to her an estate in fee simple. *Newton v. Griffith*, 1 H. & G., 111, 127; *Hoxton v. Archer*, 3 G. & J., 212. * * *

ORNDOFF v. TURMAN.

2 Leigh (Va.) 200; 21 Am. Dec. 609. (1830)

CARR, J. This cause was argued with a research and an ability worthy of its importance and its novelty; for to us it is new, though to our forefathers, both the legal doctrines and the form of action were of common and familiar use. I shall not attempt to discuss the whole subject; but shall consider those leading points only, which seem to me to govern the case.

Prudence, it is admitted, was tenant in tail. The demandants claim as her issue *per formam doni*. It is obvious, then, to examine how that claim stands affected by the statutes which our legislature has passed on the subject. It may not be amiss, however, to premise a few remarks as to estates tail.

At the common law, when lands were given to a man and the heirs of his body, he was considered as having a fee simple conditional which would revert to the donor, if the donee had no heirs of his body; but if he had, this was such a performance of the condition as rendered his estate absolute; at least, he could alien, he might forfeit, he might charge the land with rents or other incumbrances which would bind the issue. But if he did none of these things, the course of descent was regulated by the form of the gift; the land would go to the heirs of his body, and in default of such, would revert to the donor. To prevent this, it was usual for such tenants, so soon as they had performed the condition by having issue, to alien the land, and afterwards repurchase, taking an absolute estate which would descend to their heirs general. To put a stop to this practice, the nobles and great barons, anxious to perpetuate their possessions in their own families, procured the passage of the statute of Westminster second, 13 Edw. I, c. 1, *de donis conditionalibus*, which gave birth to estates tail. That family law, as Pigot calls it,

produced many and serious mischiefs, as we are told by writers on this subject, and also by some of the most eminent judges of the English bench. Thus Blackstone, 2 Com. 216, says: "Children grew disobedient when they could not be set aside; farmers were ousted of their leases, made by tenant in tail; creditors were defrauded of their debts; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; treasons were encouraged; so that these estates were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm." Still the power of the nobles prevented the repeal of the statute, and after suffering under it long, common recoveries first, and then fines, were brought to bear upon it, and these, together with some other causes, have so weakened its force and narrowed its range as almost to bring back the subject to the ground it occupied under conditional fees at the common law.

In the case of *Martin v. Strachan*, Willes, 451, 452, Lord C. J. Willes, in 1744, delivering the opinion of all the judges to the lords, and speaking of common recoveries, says: "A common recovery is a conveyance on record, invented to give tenant in tail an absolute power to dispose of his estate in fee simple. I beg your lordships' patience a moment longer, to give you an account of the true origin and nature of these recoveries. As I said before, entailed estates, by the statute *de donis*, were made unalienable, and neither the issue nor the remainderman could be barred, and this was at first considered as a very wise provision, and great encomiums were made upon this statute. But it was found by experience, in a very little time, that this statute, had produced very great inconveniences; inconveniences to the crown; inconveniences to the public; and to many private persons; to the crown, as it prevented forfeitures, and greatly increased the power of the barrons; to the public, as it was prejudicial to trade and commerce to have estates always continue in the same families, without even a power of raising money upon them; and to private persons, to have their estates so fettered that they could not make provision for younger children, nor raise money on their estates, though their necessities were never so great." He then goes to speak of the mode of bringing in recoveries in the time of Edward IV. In *Atkins v. Horde*, 1 Burr. 60, 115, Lord Mansfield, speaking on the same subject, says: "The sense of wise men, and the general bent of the people of this country, have ever been against making land perpetually unalienable. The utility of the end was thought

to justify any means to attain it. Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent to set property free, allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture. No sooner had the statute *de donis* repeated what the law of tenures said before, that the tenor of the grant should be observed, than the same bent permitted tenant in tail of the freehold and inheritance, to make an alienation voidable only, under the name of a discontinuance. But this was a small relief. At last, the people having groaned for about two hundred years, under the inconveniences of so much property being unalienable; and the great men, to raise the pride of their families, and (in those turbulent times) to prevent their estates from forfeitures, preventing any alteration, by the legislature; the same bent threw out a fiction in Taltarum's case, by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely. Public utility adopted and gave a sanction to the doctrine, for the real political reason to break entails; but the ostensible reason, from the fictitious recompense, hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention."

I cite these authorities (and might adduce many more) to show that at an early period the mischiefs of the statute had been felt, and remedies found to mitigate them, which had become settled rules of law long before the establishment of this colony; so much so, that the right to suffer a recovery, or levy a fine, was considered one of the inseparable incidents of an estate tail; and an attempt to create such estate divested of that power would have been as impotent as the effort to divest tenant in fee of the power of alienation.

In *Carter v. Tyler*, 1 Call, 182, Mr. Pendleton says, the fine and recovery at an early period was sanctioned by the courts of England, "and so became as much a law of that country as the statute itself. Our ancestors," he continues, "brought hither with them both laws as a rule of property; and the fine and recovery might have been used here if the forms could be preserved until the legislature should interpose to prohibit them." This it did by an act passed in October, 1705, and again in 1710, reserving to the legislature the sole power of docking entails. This power was exercised by acts passed on each particular occasion; these acts gave a real recompense instead of the fictitious one by fine and recovery, and were rather a change of the land on which the estate tail was to operate than a destruction of that estate. There are several other acts of the colonial

assembly showing the spirit of that body for preserving entails; of these Mr. Pendleton, in the case of *Carter v. Tyler*, gives a succinct but clear account. It may seem a little strange, at first sight, that our assembly should be inclined to cherish what had been found so mischievous in the mother country; but we must recollect that we were then a recent people, forming a distant province of the empire; that the spirit of commerce had never visited our shores; nor was that loftier spirit yet awakened which afterwards gave birth to our revolution. In the case already referred to, Mr. Pendleton says: "In the revised law of 1748 the prohibitions of fines and recoveries and permission of writs of *ad quod damnum* were continued till the revolution. That event having produced a new order of things, this great subject came before the legislature in October, 1776, under a view of all its legal circumstances, from the common law and the statute *de donis* down to that period. The subject of discussion was, whether they should restore the fine and recovery, which was objected to on account of its fictitious nature, and the trouble and expense attending it; but the principal objection was that it would permit the tenants to continue what was considered as a mischief, and that those who possessed the large estates would have an inclination to continue them in their families. They therefore resolved to cut the Gordian knot at once, and, *ipso facto*, to vest the fee simple in those who then had, or should in future have, an immediate beneficial interest; that is to say, an estate in fee tail in possession, or a remainder or reversion in tail, after estates for life or lessor estates, unfettering the estates of all future interests, depending in creation upon these estates tail." Let it be recollected that Mr. P. is speaking here of matters with which he was familiarly acquainted; that he was a prominent actor in the busy and eventful scenes of the revolution, a member of the assembly which passed the act of 1776, docking entails, and also one of the three revisers who drew the law of 1785 on the same subject.

We will look now more particularly at this act of 1776. It seems to my mind very difficult to read it, and resist the conviction that it was meant to cut up estates tail, root and branch; to make them all *ipso facto* estates in fee; to destroy "all right, title, interest, and estate, claim and demand of the issue, remainderman and reversioner;" "unfettering the estates (as Mr. Pendleton strongly expresses it) of all future interests depending in creation upon those estates tail." And this conviction is much strengthened, when we look at the nature of the subject, and the state of things at the passage of the

law. We had just cut ourselves loose from a monarchy, and established a republican form of government. This was the first assembly which met under the new constitution, and it became its duty to remodel the laws, and adapt them to the genius of our infant republic. In this labor it was natural that the law of entails should attract the earliest attention; a law mischievous in its effects upon the general interests of society, and peculiarly hostile to the experiment we were then making.

Look at the preamble, and note the object and policy of the statute, as there declared. Can we suppose that wise and patriotic legislators would intentionally leave a single fragment existing of a law, the evils of which they so strongly depict? In *Willion v. Berkley*, Plowd. 232; 11 Rep. 73; 6 Bac. Abr. 384, we are told that "such construction ought to be put upon a statute as may best answer the intention which the makers had in view, for *qui haeret in litera haeret in cortice*." Again, under the same head, in *Bacon*, and vouched by the highest authorities, it is said: "The intention of the makers of a statute is sometimes to be collected from the cause or necessity of making a statute; at other times, from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." Again, in *Stowel v. Zouch*, Plowd. 366; 10 Rep. 101; "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." Now, the statute in question makes tenant in tail, in possession, reversioner, or remainder, *ipso facto*, tenant in fee simple. In the act of 1785, which equally bears on this case, which was the work of the same hands, and which one of its makers says was not more extensive than the first law, the idea is thus expressed: "Every estate in lands or slaves, which, on the seventh of October, 1776, was an estate in fee tail, shall be deemed from that time to have been, and from thenceforward to continue, an estate in fee simple." * * *

Note: In other states the estate remains a fee tail in the first taker but becomes a fee simple in his issue. *Rudkin v. Rand*, 88 Conn. 292; 91 A. 198.

SEC. 3. BY IMPLICATION.

HAYWARD v. HOWE.

12 Gray (Mass.) 49; 71 Am. Dec. 734. (1858)

This is a bill for the specific performance of contract by defendant to purchase of plaintiff land in Braintree, alleged to have been devised to him by Josiah Blanchard of whose will the following were the material parts: "After the decease of my wife, Elizabeth Blanchard, it is my will, and I hereby give, bequeath, and devise, all my remaining property, real and personal, to be equally divided between my son, Ira H. T. Blanchard, my grandson, Hasket Blanchard, son of Marcus Blanchard, my second son, now supposed to be deceased, and my grandson, Josiah Blanchard Hayward, son of my daughter, Laura Hayward, deceased; provided also, that in case said Josiah Blanchard Hayward (the plaintiff) shall die without lawful issue, my will is that the property hereinbefore mentioned as given to him shall then descend to my legal heirs, to have and to hold, them and their heirs and their assigns forever." Testator's wife had died, and the land had been set off to plaintiff. Plaintiff had tendered defendant, who had agreed to purchase the land, a warranty deed, which defendant refused to accept. The defendant demurred to the bill on the ground that plaintiff had only a life estate under the will of Josiah Blanchard.

BIGELOW, J. This case has been very ably argued by the counsel for the defendant, and if the premises assumed by him were sound, it would be difficult, to escape from his conclusion. But there is a fallacy in his ingenious argument, which consists in the assumption, as the basis of the reasoning, that the devise to the plaintiff of the premises in controversy is in legal effect a gift in express terms to him for life, and on his death to the heirs of his body, or, what is equivalent, to his lawful issue. But such is not the true interpretation of the devise, construing, as we are bound to do, the two clauses relating to the premises together, as being made *uno flatu*, and operating to vest an estate in the devisee at one and the same time. Thus construed, the devise is of an estate-tail, which vests in the first taker something more than an estate for life. In other words, the language of the will relating to the premises in dispute creates an estate-tail in the plaintiff by implication, and has the same force and effect, *ex vi termini*, as if it had been in express terms to the

devisee and the heirs of his body lawfully begotten. This point is fully settled by a series of adjudications in this commonwealth, cited by the counsel for the plaintiff, especially by *Parker v. Parker*, 5 Met. 134, and *Wheatland v. Dodge*, 10 Id. 502. It follows that this is not a case to which the statute abolishing the rule in *Shelley's Case* (R. S., c. 59, sec. 9) applies. This statute was not intended to prohibit or restrain the creation of estates-tail when the devise should be made by apt and sufficient words, according to the well-established rules of law. It was only intended to be applicable to those cases where the devise was in express terms or in substance and effect to the first taker for life, and was designed to give effect to the particular intent creating a life estate, to the exclusion of the general intent to create a fee-tail, which the rule of the common law implied from a gift so expressed. But in this case no particular intent to give to the plaintiff a life interest is expressed or implied. On the contrary, as has been already stated, the implication is that an estate-tail was created.

Demurrer overruled.

PARKHURST v. HARROWER.

142 Pa. St., 432; 24 Am. St. Rep. 507, 21 Atl. 826. (1891)

PER CURIAM. The single question here is, whether the plaintiff has, by virtue of the devise to him by his father, Joel Parkhurst, an estate in fee-simple, in the real estate in question, which he can assure to the defendant by deed of special warranty. That portion of the will of Joel Parkhurst under which this contention arises is as follows: "I also give and devise to the said Benjamin H. Parkhurst. . . . the Timothy Coates farm, to have and to hold the said last three lots of land above described, with the appurtenances, to the said Benjamin H. Parkhurst during the period of his natural life, remainder thereof to his issue, if there be any at the time of his decease, in fee-simple, the issue of any deceased child of the said Benjamin to take the same share and estate as the parent would have been entitled to if living at the death of said Benjamin. But on failure of issue of said Benjamin, or of his deceased child or children, at the time of his death, then I direct that the said real estate, above devised to said Benjamin for life shall at the time of

his decease go to and vest in the then heirs at law of me, the said testator, in fee-simple, in such shares as the said heirs would be entitled to under the intestate laws of the State of Pennsylvania."

The contention of the appellant is, that under this will he took an estate-tail, which was enlarged into a fee by the act of 1855. On the other hand, the appellee contends the appellant took a life estate only. The court below sustained the latter proposition.

It will be seem, from a careful examination of the above clause in his will, that the testator gives to his son Benjamin, (a). An estate for life; (b). Remainder to his issue, (if there be any at the time of Benjamin's decease) and to the issue of any deceased child of the said Benjamin; and (c). Remainder to the heirs at law of the said testator, on failure of issue of said Benjamin, or of his deceased child or children, at the time of his (Benjamin's) death.

In a will, the word "issue" *prima facie* means "heirs of the body", and is a word of limitation, and not of purchase, unless there be something on the face of the will to show it was intended to have a less extended meaning, and to be applied to children only, or to a particular class, or at a particular time: *Reinoehl v. Shirk*, 119 Pa. St. 113; *Shalters v. Ladd*, 141 Pa. St. 349. It is therefore to be construed either as a word of limitation or of purchase, as will best effectuate the intention of the testator gathered from the whole instrument. It is manifest from an examination of this will that when the testator used the word "issue", he intended children and grandchildren of his son Benjamin. When he speaks of the "failure of issue of said Benjamin, or of his deceased child or children", he refers to Benjamin's death without leaving a child or children, or the issue of a child or children, surviving him, the said Benjamin. The words "issue" and "children" are used synonymously.

The words "die without leaving issue", and other expressions of the same import, standing alone, mean an indefinite failure of issue: *Taylor v. Taylor*, 63 Pa. St. 481, 3 Am. Rep. 565; *Middleswarth v. Blackmore*, 74 Pa. St. 414. At common law, in the absence of words making a different intent apparent, the established interpretation of such expressions in a will is, that they import a general indefinite failure of issue, and not a failure at the death of the first taker; and such has undoubtedly been the rule in this state since *Eichelberger v. Barnitz*, 9 Watts. 447; *Hackney v. Tracy*, 137 Pa. St. 53. This rule, however well established, always yields when a contrary intent is clearly expressed by a testator. The language used by this testator leaves no room for doubt upon this question. He

refers, as clearly as language can make it, to a failure of issue at the death of the first taker, viz., his son Benjamin. The gift to the latter "during the period of his natural life, remainder to his issue, if there be any at the time of his decease," and the words "on failure of issue of said Benjamin or of his deceased child or children, at the time of his death," all contained in the same paragraph, clearly refer to the death of Benjamin, and not an indefinite failure of issue.

We have, then, a gift to Benjamin for life, remainder to his children and grandchildren, if any there be at the time of his death; and in case there shall be neither living at Benjamin's death, then to the heirs at law of the testator as they would take under the intestate laws. We are of opinion the learned judge below was right in holding that Benjamin took but a life estate, and in entering judgment for the defendant in the case stated.

Judgment affirmed.

CHAPTER V.

ESTATES FOR LIFE.

Litt. Sect. 56.

Tenant for terme of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life; and he which holdeth for terme of another's life, is called tenant for terme of another man's life.

MEE v. GORDON.

187 N. Y. 400; 116 Am. St. Rep. 614; 80 N. E. 353. (1907)

HISCOCK, J. * * * The clauses under review read as follows: "In the event of my husband and myself dying at one and the same time or within a short period of each other, I give, devise and bequeath my estate to be equally divided between my sister Elizabeth Illensworth, my brother John B. Mee, my nephew William P. Illensworth and my niece Florence C. Illensworth share and share alike. I hereby direct that the share due my brother John B. Mee be invested by my Executors for his benefit during his natural life and for the benefit of his wife and his issue after his death."

The husband of the testatrix died a short time before she did, so that this disposition became operative upon the probate of the will.

It may be conceded, of course, that the first sentence standing alone and unmodified would have given a share to John B. Mee absolutely and without qualification. But it does not stand alone and unmodified. It is immediately, without the intervention of any other provision or purpose, followed by a second sentence which is clearly connected with and related to it, and which specifically treats of the share referred to and created in the first sentence. When this second sen-

tence directs that "the share due my brother John B. Mee be invested," etc., it not only plainly but necessarily refers to the share which is described and created in the immediately preceding sentence. There is nothing else for it to refer to. It is utterly irrelevant and inexplicable unless it does refer to that share. Otherwise it is predicated upon nothing, means nothing, and there is no excuse for its existence. As we look at it, even in the light of the learned opinion below and of the argument of counsel, it seems to us that this second sentence only becomes subject to the criticism of ambiguity and obscurity which is leveled at it when we deny to it its connection with the first sentence, and its natural and obvious meaning, and seek to find some other purpose which is nowhere disclosed in the will. We assume that if the testatrix had changed this entire provision, saying; "I give, devise and bequeath my estate to be divided equally between * * * my brother John B. Mee, * * * share and share alike, except that I hereby direct that the share due my brother John B. Mee * * * be invested," etc., no one would contend that the result of such provision as a whole was to create more than a life interest. It is possible that such form would have been a little plainer than the one in question, but not much, and it is too well settled to require the citation of authorities that the intent of the testatrix will not be defeated by the injudicious use of punctuation or by the substitution for some perfectly apt word of one less so, providing her meaning can reasonably be found.

We think, therefore, that this second sentence does clearly relate to and modify the effect of the first one in so far as it relates to the interest of John B. Mee, and that it is sufficient to cut down, so far as he is concerned, the absolute estate first suggested to an interest for life even within the rules established by the cases relied upon by respondent like *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291.

We do not regard it necessary to review all of the cases cited for the purpose of leading us to an opposite conclusion, for the same principles prevail in all of them, the variation in expression of those principles being but the reflection of the differing phase of facts presented in each case. We shall refer at any length only to that authority which seems to be most strongly relied upon by respondents.

The *Banzer* case (156 N. Y. 429, 51 N. E. 291) held that an absolute estate created by an earlier provision in the will was not cut down to a lessor estate or interest by a later provision, but the facts upon which that decision was reached are removed by very many degrees from similarity to those now presented to us. This is made

apparent not only by an examination of the facts themselves, but by a consideration of what was said by Judge Martin. The action involved an alleged interest of a widow in real property which passed under the will of her husband. The first provision, as stated in the opinion, read: "I give, and bequeath to my wife all my real and personal estate at present or hereafter in my possession; my real estate, consisting at present of a part of a house known as number 220 West 32d. street." This was the only provision which in any way related to the real estate of the testator, and, as was conceded, disclosed a clear and manifest intent to devise to the wife the real estate in question and to vest in her an absolute fee to the property. As was said by Judge Martin: "No clearer or more decisive language could have been employed to effectuate that purpose." After this provision another was inserted in the will as follows: "And my personal estate, and whatever belonging to me at my death, whatsoever and wheresoever, of what nature, kind and quality soever may be, that she shall have undisputed right to and dispose of according to her own judgment; that, after her death, my beloved children, or their executor, administrator, shall divide the same, share and share alike."

Reviewing this last clause, Judge Martin said that it was probable that it was intended to apply only to personal property, adding: "But be that as it may, we think it is quite apparent that that clause was not intended and cannot be held to affect or cut down the devise of his real estate to his wife. Its provisions are distinct and disconnected from the clause disposing of the real estate in suit. The manifest purpose of that provision was to dispose of the remainder of his property not previously and specially devised, and not to change or modify the previous provisions of his will."

It is perfectly manifest that natural and legal construction led directly to the conclusion thus stated. No reasoning can make plainer than does a mere reading of the last clause that its controlling purpose is the disposition of personal rather than of real estate, and that there is no language used which within any principle of interpretation ever adopted sufficiently connects the last clause to the first one and reduces the absolute devise first made to a lessor estate.

But it is urged that assuming the later clause before us to be connected with and applicable to the first clause and otherwise sufficient to limit the interest of John B. Mee to one for life, said later clause is subject to such vices as to make it ineffective to accomplish such result. These alleged faults are, first, that it does not create any

authorized trust for the life of John B. Mee, and, secondly, that if it does create a trust for his life it seeks to continue the same during the lives of his wife and children, and, therefore, offends against the rule relating to the suspension of the power of alienation. It is possible that if the predominating purpose in the construction of wills was to seek faults and declare them invalid, we might be led to the conclusions thus urged upon our attention. But remembering that the opposite purpose should prevail where legally possible we have no great trouble in determining that the clause in question created a valid express trust to collect the rents and profits for the benefit of John B. Mee, during his lifetime, and that the disposition contemplated by the testatrix after his death was an absolute remainder to his wife and children. We will take up the objections urged to the clause in the order stated.

The duty of investing and administering the share in question, it is true, is imposed upon persons who are designated as executors rather than trustees, but it is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position, and that where the duties of a trustee are imposed upon a person he will be regarded as a trustee rather than an executor: *Tobias v. Ketchum*, 32 N. Y. 319; *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373.

No power of sale is expressly conferred upon the executors, but they are directed to invest the share being disposed of, and if compliance with this direction involves the sale of real estate the possession of such power will be implied: *Van Winkle v. Fowler*, 52 Hun, 355, 5 N. Y. Supp. 317; *Dorland v. Dorland*, 2 Barb. 63; *Morton v. Morton*, 8 Barb. 18.

The testatrix does not say in explicit words that the rents and profits of the share with which she is dealing shall be collected and paid over to the life tenant. But there is no possible way in which her commands with reference to it can be obeyed except by doing that very thing. It is directed that the share shall be invested, and this necessarily implies that the principal is to be kept intact. It is directed that it shall be invested for the benefit of the life tenant during his natural life, and no power is given to him of disposition by will or otherwise, and how then shall he get the benefit of this share thus invested except by the collection and payment to him of the rents and profits thereof.

In short, by express provision and necessary implication we seem to find all of the essential elements of a familiar express trust.

Passing to the second criticism, it is true that the investment of this share is also declared to be for "the benefit" of the life tenant's wife and issue after his death, but certain prominent features of this provision lead naturally to the interpretation that an absolute disposition in remainder was intended rather than the creation of a second trust. We must remember all through the construction of this will that apparently it was formulated by the testatrix herself, and that, therefore, we must measure the language and seek her intentions somewhat from the standpoint of a layman. The testamentary scheme which we have credited to her of creating a life trust for her brother made it necessary or proper that there should be an investment of the property. Such investment would be for his benefit during life. It was also natural and appropriate that the testatrix should direct that this investment, secondarily, should be for the benefit of the wife and children. That was the fact. It was for their benefit. But we discover nothing which requires that this benefit should be derived only through the medium of a trust. The direction for investment of the share became applicable immediately upon her death and was incidental to the life trust. Its purpose would be served by carrying the principal of the share forward to the death of the life beneficiary with final distribution at that time. If an investment had been directed after the death of the life tenant for the benefit of the others, then there might be found some evidence of a purpose to tie the property up in a trust commencing at that time for a second set of lives. But such aspect is wanting. Neither does the direction that the investment should be after the death of the husband "for the benefit" of the wife and children necessarily or even by any preponderance of argument lead to the conclusion that a trust was intended rather than a final and absolute distribution of the share. There is nothing in the quoted words which is sacred to the idea of a trust. On the other hand, it is obvious that in no manner would the beneficiaries more thoroughly and fully get the benefit of the property than by passing it over to them in absolute remainder with unlimited right of use and enjoyment. This view and the conclusion that testatrix intended such an absolute remainder rather than a trust, are supported by what was held and said in *Crain v. Wright*, 114 N. Y. 307, 21 N. E. 401.

In that case the question arose whether a devise to the testator's widow of certain lands "to have and to hold for her benefit and support," conferred an estate in fee or for life, and the former was held to be the correct answer. Judge Vann, after reference to the

provisions of the Revised Statutes that the term "heirs" or other words of inheritance shall not be requisite to create or convey an estate in fee, and that every grant or devise of real estate shall pass all the estate or interest of the grantor or testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant," said: "We think that the words 'for her benefit and support' indicate the reason for making the gift, rather than the intention of the testator to annex a condition or limitation to the gift. * * * Moreover, the premises were devised to her not only for her support, but for her benefit. The use of the word 'benefit' in connection with a gift of property is significant. It is consistent with a devise in fee, but inconsistent with the devise of a life estate. A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate."

What we may regard as the natural meaning and scope of the provision for the benefit of the wife and children as framing an absolute estate in remainder is confirmed by a comparison of the provision for them with that for the life beneficiary. Some very significant omissions will be noted in the case of the former. The benefits to be derived by John B. Mee are expressly limited to his life. No such limitation is applied to his successors. Then no course is marked out for this share after the death of the wife and issue, as properly would have been done if their interest was limited by life, but the "benefit" is conferred upon them absolutely and without qualification as to manner or duration of enjoyment. Under all of the circumstances we think that we are amply justified in interpreting the intent of the testatrix to have been to give an absolute remainder.

* * *

MILES v. MILES.

32 N. H. 147; 64 Am. Dec. 363. (1855)

Bill in Equity, filed by Abraham Miles, against Tichenor Miles, Nancy Miles, Lydia Miles, Joseph Meserve and wife Betsey Meserve. The bill sets forth that plaintiff is tenant in common of the remainder and seeks to restrain the defendants from committing any further waste on the premises; and that they be compelled to account for

all timber illegally cut by them, and to pay the complainant his proportionate part of the value, and for other relief.

EASTMAN, J. From an examination of the bill and answers, it will be perceived that the defendant Nancy Miles, and her sister, Betsey Meserve, have severally life estates in the premises, subject to the dower of their mother, Lydia Miles; and that Abraham Miles, the complainant, and Tichenor Miles, the brother and one of the defendants, are interested as tenants in common in the remainder.

The complainant, being thus interested in the premises as a remainderman, has resorted to a remedy for the grievances complained of—the staying of waste; that is recognized, not only by courts of equity generally, but by the express provisions of our statute: *Williams v. Duke of Bolton*, 3 P. Wms. 268; note; 1 Story Eq. Jur., sec. 69, note; *Id.*, secs. 517, 518; 4 Kent's Com. 77; 3 Daniell's Ch. Pr. 1849; R. S., c. 171, sec. 7. * * *

There can be no doubt that a tenant for life may take from the land wood necessary for the repairing of fences and buildings which are on the premises at the commencement of the tenancy: *Co. Litt.* 41b., and 53b., 2 Bla. Com. 122; *Padelford v. Padelford*, 7 Pick, 152; *Fuller v. Wason*, 7 N. H. 341; *Elliot v. Smith*, 2 N. H. 430. But this right cannot extend beyond the proper use of wood and timber upon the premises themselves. The title in the wood and timber, until cut, is in the reversioner or remainderman. The estate of the tenant for life consists in the use of the premises, and nothing more. This use, to be made of service to the tenant, must be such as to give him necessary fuel, that he may remain upon the premises, and sufficient timber to keep the fences and buildings in repair. The annual crops of course belong to him, for they are not permanent in their nature. It is equally, too, for the advantage of the reversioner that the buildings and fences should not be suffered to go to decay. But when it is permitted to the tenant to cut wood or timber for purposes disconnected with the premises, he is no longer using his life estate in the land, but is converting to his use the permanent growth of the land—the wood and timber—which belong to the reversioner. And although it may seem to be holding the rule strictly to say that trees may not be exchanged for boards and stakes to repair the fences on the premises, as was the case in *Elliot v. Smith*; or that wood may not be consumed in a house not situated on the premises, in quantity less than would be used in the house upon the premises, as was the case in *Fuller v. Wason*; or that trees may not be exchanged for as great or greater quantity

of fire wood than the trees would make, as was the fact in *Padelford v. Padelford*; yet it must be perceived that any departure from the rule requiring the wood and timber to be used on the premises, and for the advantage of the same, might lead to abuses which in the end would work great injustice to the reversioner; and although there may be instances in which no injury would arise to any one by a slight departure from the rule, yet we think that it will be better to adhere to the doctrine as advanced in the authorities cited.

Upon these principles, taking the bill and answers as the basis of our conclusions, and how stands this case?

Joseph Meserve, and Petsey, his wife, have never cut or taken from the premises either wood or timber, except through their tenant, Kingman. They had the right to lease to Kingman; for tenants for life have the power of making under-leases for any lesser term; and the same rights and privileges are incidental to those under-tenants which belong to the original tenants for life; 4 Kent's Com.

73.

Kingman occupied the part belonging to the Meserves for two years, and during that time cut twelve sapling pines, with which to make boards to repair the bars and fences on the place. A part of the boards he used for that purpose, and the rest he left upon the premises, intending to use them if his lease had continued; also the wood from the tops he left there. All that Kingman did was for necessary repairs on the premises, and neither he nor the Meserves are chargeable with waste, upon the bill and answers. * * *

THOMAS v. EVANS.

105 N. Y. 601; 59 Am. Rep. 519; 12 N. E. 601. (1887)

RUGER, CH. J. * * * A claim to recover back property which has been fairly sold and paid for at its full value, and the consideration of which has accrued to the benefit of the plaintiffs, without offering to render compensation to one, who honestly believing himself to be its lawful owner, expended large sums in its improvement, and which now constitute its greatest value, seems to be unjust and inequitable.

We are of the opinion that the purchase-price originally paid for the land and the value of the improvements, to the extent that they

have added to its permanent value, constitute an equitable claim, and that even if the plaintiffs should establish an equitable right to the property it would not entitle them to judgment therefor, except upon the condition of refunding to the defendant Evans the amount so expended.

It was found by the trial court that the purchase-price was mainly paid in relieving the land from the assessments imposed upon it. These assessments were a charge upon all of the land, and the interest of the remaindermen, as well as that of the life tenant, was liable to be sold therefor. It is provided by statute, in the case of real property in which several persons have successive interests, incumbered by taxes and assessments, rendering it liable to sale therefor, that upon the application of any of the parties interested the court may order a sale of the fee or a part thereof for the purpose of discharging the liens upon the remainder. Chap. 341, Laws of 1841; chap. 357, Laws of 1855; *Jackson v. Babcock*, 16 N. Y. 246; *Dikeman v. Dikeman*, 11 Paige, 484. Thus the property of the plaintiffs was legally liable for the payment of these assessments. Although the method provided by statute was not pursued, we see no reason why a court of equity, called upon to settle the equitable rights of the parties, should not charge remaindermen with the reimbursement of moneys actually and honestly expended for the benefit of their estate, and which they were legally liable to pay.

The general rule applicable to the relation of life tenants and remaindermen does not authorize the former to charge the latter with the cost and expense of permanent improvements put upon the property by him during the life tenancy. *Dent v. Dent*, 30 Beav. 363; *Moore v. Cable*, 1 Johns. Ch. 385. This rule is founded upon principles of justice having reference to the rights and interests of remaindermen, and should not be inconsiderately impaired or evaded.

It is also the general rule that municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remaindermen, according to the circumstances of the case, and their respective interests in the property (*Stillwell v. Doughty*, 3 Bradf. 359; *Peck v. Sherwood*, 56 N. Y. 615), while the ordinary taxes of government are properly chargeable to the life tenant alone. *Deraismes v. Deraismes*, 72 N. Y. 154; *Cairns v. Chabert*, 3 Edw. Ch. 312. Such are the rules applicable to those relations, when they are open and acknowledged, and no special circumstances exist authorizing the application of principles of equity, to reimburse one who in good faith has increased the intrinsic value

of the property, by expending his own means in making permanent erections and valuable additions thereto under the belief that he was its lawful owner. Such circumstances are held to exist when a trustee or mortgagee in possession supposing, in good faith, that he has acquired title in fee to the property, goes on and deals with it as his own, and makes improvements which are of permanent benefit to the property. *Putnam v. Ritchie*, 6 Paige, 390; *Mickles v. Dillaye*, 17 N. Y. 86. * * *

Note: The life tenant stands to the remainderman in the position of a *quasi* trustee. He cannot acquire an outstanding title for his own exclusive benefit and cannot act with regard to the property to the injury of the remainderman. *Whitney v. Salter*, 36 Minn, 103; 1 Am. St. Rep. 656; 30 N. W. 755.

On the question of the liability of the life tenant without impeachment for waste committed by him, see the case of *Duncombe v. Felt*, 81 Mich. 332; 45 N. W. 1004.

CHAPTER VI.

ESTATES FOR YEARS.

- Section 1. Nature of Estate.
- Section 2. Implied Covenant of Enjoyment.
- Section 3. Condition and Use of Premises.
- Section 4. Assignment and Subletting.
- Section 5. Covenants Running with the Land.
- Section 6. Estoppel to deny Landlord's Title.
- Section 7. Termination of Estate.
- Section 8. Destruction of Premises.

SEC. 1. NATURE OF ESTATE.

Litt. Sect. 58.

Tenant for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.

Co. Litt. 45b.

For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and herewith agreeth Bracton, *terminus annorum certus debet esse et determinatus*. And Littleton is here to be understood, first, that the yeares must be certaine when the lease is to take effect in interest or possession. For before it

takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If A. seised of lands in fee grant to B. that when B. payes to A. xx. shillings, that from thenceforth he shall have and occupie the land for 21 yeares, and after B. pays the xx. shillings, this is a good lease for 21 yeares from thenceforth. For the second, if A. leaseth his land to B. for so many yeares as B. hath in the mannor of Dale, and B. hath then a terme in the mannor of Dale for 10 yeares, this is a good lease by A. to B. of the land of A. for 10 yeares. If the parson of D. make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine than the time of death, *Terminus vitae est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis*. But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for 6 yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine.

If a man maketh a lease to I. S. for so many years as I. N. shall name, this at the beginning is uncertaine; but when I. N. hath named the yeares, then it is a good lease for so many yeares.

A man maketh a lease for 21 yeares if I. S. live so long; this is a good lease for yeares, and yet is certaine in uncertainty, for the life of I. S. is uncertaine. See many excellent cases concerning this matter put in the said case of the bishop of Bath and Wells. By the ancient law of England for many respects a man could not have made a lease above 40 yeares at the most, for then it was said that by long leases many were prejudiced, and many times men disherited, but that ancient law is antiquated.

CALDWELL v. CENTER.

30 *Calif.* 539; 89 *Am. Dec.* 131. (1866)

RHODES, J. The cause was submitted to the jury both upon the theory of title under the Van Ness ordinance and prior possession, and the verdict for the plaintiff being general, it is impossible to determine from the record upon which theory it was rendered; but admitting that the evidence, which we think was clearly insufficient to establish title in the plaintiff under the Van Ness ordinance, tended to show such prior possession in Foley that the verdict would not be disturbed on the ground that the evidence was insufficient on that point, it becomes necessary to pass upon some of the other questions of the case. * * *

Charge of court on facts in issue. The only remaining point we shall notice is the alleged error of the court in giving that portion of the charge to the jury which is recited in the transcript. We are clearly of the opinion that the charge is erroneous, for it assumes as a fact proven that Perkins was the tenant of the plaintiff. That was a fact in issue between the parties, and was to be found as a fact by the jury from the evidence adduced by the respective parties. The production of a lease will not of itself show that the relation of landlord and tenant existed between the parties to the lease; and although it is the province of the court to construe the instrument when admitted in evidence, yet the court cannot declare, as a matter of law, that the party named therein as the lessee was the tenant of the lessor, because there must be further shown by competent evidence the entry of the lessee under the lease, or a holding of the possession of the premises by the lessee that will be referable to the lease as his authority. Those are matters of fact to be ascertained by the jury in like manner as the delivery of a deed after its execution is proven, and may not be assumed by the court as facts unless admitted by the parties to the action.

Judgment reversed, and cause remanded for a new trial.

SEC. 2. IMPLIED COVENANT OF ENJOYMENT.

MAYOR, ETC. OF NEW YORK v. MABIE.

13 N. Y. (3 Kernan), 151; 64 Am. Dec. 538. (1855)

Appeal from a judgment for plaintiff on a verdict taken subject to the opinion of the court on a case. The case showed a city lease, in writing, made by the corporation of the city of New York, of the right to collect wharfage at certain piers. The lease contained no express covenant for quiet enjoyment; and it did not reserve to the city any privilege of interfering with the management of vessels at the piers. The complaint was for the rent due on the lease. The answer alleged that the agents of the city had, without right, come upon the premises and assumed control of vessels seeking to use the piers, and had, to the damage of defendant, the tenant, given the exclusive use of them to vessels of particular classes, and to certain ship-owners, forbidding others to resort to them even when they were unoccupied, and sought recoupment of damages thus sustained. The court excluded the evidence offered by defendant and a verdict was taken by plaintiff, subject to opinion.

DENIO, J. It is not denied but that the acts imputed to the plaintiffs in the answer would, if established, be an infringement of the rights of Mabie, under the grant from the corporation. But it is argued by the plaintiffs' counsel that the disturbance complained of was a mere wrong, unconnected with the contract upon which the action is brought; and that the only remedy which Mabie has is to maintain a separate action for his damages. The case is the same, it is said, as though a stranger had interfered, to the damage of Mabie. This would have entitled the latter to an action on the case, and it is insisted that the same mode of redress is the only one which he has against the plaintiffs. Before the doctrine of recoupment had been as firmly established as it now is, it was repeatedly decided that the lessee could not, in an action for rent, set up the breach by the plaintiff of a covenant in the same lease, though such covenant concerned the subject for which the rent was agreed to be paid: *Tuttle v. Thompkins*, 2 Wend. 407; *Etheridge v. Osborn*, 12 Id. 529; *Sickels v. Fort*, 15 Id. 559. The principle of these cases was afterwards repeatedly disapproved of in the same court in which they were decided; and it cannot be denied, consistently with the doctrine now well established, but that in an action for a breach of contract the

defendant may show that the plaintiff has not performed the same contract on his part, and may recoup his damages for such breach in the same action, whether they are liquidated or not; or may, at his election, bring a separate action: *Ives v. Van Epps*, 22 Wend. 155; *Batterman v. Pierce*, 3 Hill (N. Y.), 171; and see the authorities cited in these cases. The Superior Court, in the judgment we are reviewing, does not controvert the doctrine of recoupment to the extent just stated; but the judges of that court are of opinion that there is not in this case any covenant on the part of the corporation guaranteeing to Mabie the quiet enjoyment of the rights which were granted to him, and therefore they hold that the doctrine of recoupment does not apply.

There is not found, in the contract set out in the complaint, any express undertaking on the part of the corporation that Mabie shall have and enjoy the interest conveyed; but the defendants insist that there is one implied in law. If the grant in question was a lease of corporeal property for a term, there is no doubt whatever but that, independently of the statute which we shall presently consider, there would be an implied covenant by the grantors for quiet enjoyment by the grantee: *Noke's Case*, 4 Co. 80b.; *Barney v. Keith*, 4 Wend. 502; *Tone v. Brace*, 8 Paige, 597; *Platt on Covenants*, 40.

But the right to wharfage, which was the subject conveyed by the corporation to Mabie, was an incorporeal right; and it does not necessarily follow that all the legal incidents of a lease for years, of land, attach to the conveyance. On examination of the cases, however, I have come to the conclusion that the principle is not limited to demises of tangible property, but that it applies in its full force to conveyances of incorporeal rights. In *Seddon v. Senate*, 13 East, 63, the plaintiff declared for a breach of covenant in an indenture by which the defendant had conveyed to him all the defendant's "right, title, interest, claim and demand" to a certain medicine which he had invented; and authorized the plaintiff to prepare and sell the same, and receive the profits to his own use. The breach assigned was that the defendant had prepared and sold the medicine for his own profit, and authorized others to do so, contrary to the indenture, and to his covenant with the plaintiff. The defendant demurred, insisting that there was no such covenant in the indenture set out in the declaration as the one referred to in the breach. The defendant's counsel argued that, conceding a good interest in the subject-matter was conveyed to the plaintiff, and that he thereby acquired a property in it, the law would give him the ordinary remedies against such

a wrong-doer without any covenant, and that the plaintiff was wrong in suing on a supposed covenant which did not exist. But the court held that the assignment of all the defendant's interest and property in the medicine raised an implied covenant that he would not prepare and sell it, or engage others in so doing for his own profit. Lord Ellenborough, C. J., said that the defendant "having sold and assigned the medicine, by words competent to convey the whole property in it, as he has done by this deed, when he is afterwards concerned with others in making and vending on his own account the same medicine, is not that a manifest breach of his covenant? How can he be said to have conveyed all his right, title, and interest in the subject-matter if he retain the making and vending, and the profits arising from the sale, of any part of it? It is a manifest contravention of this contract for the sale of the whole." Grose, J., remarked: "It amounts to a contract that the whole thing bargained and sold should be the exclusive property of the vendee; the breach, therefore, of that covenant is well assigned." LeBlanc, J., said the question was, "whether, when it appears that the defendant agreed to part with his whole interest in the medicines, and he does convey in terms large enough to cover his whole interest, the law will not imply a covenant that he shall not himself vend that for his own profit which he had agreed to sell, and had sold, to another. And it appears to me that the breach assigned against him in that respect is not like a mere tort committed by a stranger, but is a breach of that right which he had conveyed to another." Bayley, J., said: "A covenant is nothing more than an agreement, in construing which we have only to look at the fair meaning of the parties to it; and if the agreement was, in substance and effect, that the defendant would sell and assign to the plaintiff the sole right of making and vending the medicine for his profit, and that the defendant would not interfere with him in making and vending it, that raises an implied covenant on the part of the defendant that he would not make and vend it; and if he does afterwards make and vend it, it is a breach of that implied covenant." Finally, Lord Ellenborough stated that "no argument could be drawn from the opinion delivered by the court to authorize the extension of the doctrine to the wrongful act of a stranger; but they considered the breach committed by the defendant as a retention and exercise of a right by him, the original proprietor, over the medicine which he had conveyed to the plaintiff". Other instances of covenants of quiet enjoyment, implied in conveyances of incorporeal hereditaments, will be found referred to in *Platt on Covenants*, 58.

The main object of a covenant for quiet enjoyment is to protect the lessee from the lawful claims of third persons having a title paramount to the lessor; but such a covenant, when fully written out, provides also for the protection of the lessee against the unlawful entry of the lessor himself: *Platt on Covenants*, 312. Consequently, where the law implies such a covenant from the character and terms of a conveyance not containing any express engagement, the scope of the implied guaranty should be equally extensive. The case of *Seddon v. Senate*, 13 East, 63, is a striking application of that principle; and other cases may be found in the section on implied covenants in Mr. Platt's treatise, pp. 40 *et seq.* It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and be therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title: *Platt on Covenants*, 319, 320. It need not be averred in the pleading that the grantor acted under a claim of title; but if the character of the act be such as reasonably to show that the defendant acted upon such an assumption, the action will be sustained. Thus where the defendant demised to the plaintiff, with a full covenant for quiet enjoyment, certain premises, to which a pew in a church was appurtenant, and the lessee brought covenant against him, alleging that he had disturbed him in the use and enjoyment of the pew, by sometimes sitting in it himself, and at other times putting other persons into it, and by locking it up on other occasions, the objection being taken that these acts were mere trespasses, the court said: "The act itself asserts a title; for the defendant locked up the pew, which is as strong an assertion of right as can well be imagined:" *Lloyd v. Tomkies*, 1 T. R. 671. The acts imputed to the plaintiffs in this case are equally unequivocal; and when we consider that they were a municipal corporation, acting by agents, and were, moreover, the general owners of the wharfage, and that they authorized and directed those agents to assume a control over the berths and locations which ships were accustomed to occupy, and granted such berths and locations to shipmasters for a compensation to be paid by them, we must infer that this was done under some claim of right.

These considerations have led me to the conclusion that there was in this case, upon the principles of the common law, an implied covenant by the plaintiffs to abstain from interfering with the right

which they granted to Mabie, in the manner which the answer charges them with having done. It remains only to inquire whether the statute has forbidden the implication of a covenant of quiet enjoyment in such a case as this.

The legislature has declared that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not:" 1 R. S. 738, sec. 140. If this grant of wharfage for one year is a conveyance of real estate, no covenant can be implied in it, and there can be no recoupment for an alleged breach of covenant. I am of opinion that it is not a conveyance of real estate. Section 10 of title 5, of the same chapter of the revised statutes in which the foregoing provision is found, defines certain of the terms there used, thus: "The terms 'real estate' and 'lands', as used in this chapter, shall be construed as co-extensive in meaning with lands, tenements, and hereditaments:" Id. 750. In a subsequent chapter of the revised statutes—that which relates to the proof and recording of conveyances—there is another definition of one of these terms, as follows: "The term 'real estate' as used in this chapter, shall be construed as co-extensive in meaning with lands, tenements, and hereditaments, and as embracing all chattels real, except leases for a term not exceeding three years:" 2 R. S. 762, sec. 36. There is much significance in the language added to the first definition when the same terms came again to be defined for another purpose. It is a virtual declaration that the words employed to define real estate, in the first definition, would not embrace chattels real. We must intend that in those definitions language was used with great care and discrimination. The object being to remedy, by precise definitions, the inconveniences arising from the use of words to which different meanings might otherwise be attached, we cannot suppose that any vagueness of expression would be indulged. In comparing these two definitions with each other, we arrive at a pretty satisfactory conclusion that the legislature understood the words "lands, tenements, and hereditaments" as excluding terms for years in land. And in this I think they were clearly right. The legislature was dealing with terms of art, and is presumed to have used them in their technical sense. We might lay out of view in this case the word "lands", for that word always refers to something corporeal; but the other two words may be correctly applied to an estate in incorporeal hereditaments. Now, a term for years in lands (and *a fortiori* in incorporeal rights) is not in law a tenement or a hereditament. Coke says that "*tenementum*, tenement, is a large word, to pass not only lands and

other inheritances which are holden, but also offices, rents, commons, profits *apprender* out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is seised *ut de libero tenemento*:" 1 Co. Lit., Thomas's ed., 219. "But hereditament," he says, "is the largest word of all that kind; for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real, personal, or mixed:" Id. The first of these definitions requires that the estate or interest, to amount to a tenement, should be a freehold at least; and to be termed a hereditament, according to the second, it must be descendible by inheritance. Terms for years fall within the definition of things personal. They go to the executors, like other chattels; and although they are denominated chattels real to distinguish them from mere movables, they are not, when speaking with legal accuracy, considered real estate: 2 Bla. Com. 386. In *People v. Westervelt*, 17 Wend. 674, the meaning of the terms "real estate" and "tenements" at common law was shown to exclude terms for years and other chattel interests; and it was furthermore shown that these words were used in that sense in that part of the revised statutes which relates to the redemption of lands. The Supreme Court, it is true, in *Kinney v. Watts*, 14 Wend. 38, held that the provision in the revised statutes, forbidding the implication of covenants, embraced leases and other conveyances of terms for years, where the term exceeded three years; but this conclusion was arrived at by inadvertently applying to the case the second definition of real estate, which is found in the chapter respecting the recording of conveyances. The learned judge who delivered the opinion does, indeed, say that the legal import of the terms would be the same which he gave them, if there had been no legislative definition; but having found, as he supposed, a statutory definition which precisely suited the case, he examined less attentively than he otherwise would have done as to their meaning at common law. Chancellor Walworth had occasion to examine this question in *Tone v. Brace*, 11 Paige, 566, and he held that the Supreme Court in *Kinney v. Watts*, fell into an error, and that the statute referred to had no application to terms for years. See also *Tone v. Brace*, 8 Paige, 597, S. C. 1 Clarke Ch. 503. I am satisfied that the construction adopted by the chancellor is the true one, and that there is nothing in the provision of the revised statutes under examination which forbids us from finding, in the grant in question, an implied covenant against the acts of the grantors and against others claiming by lawful title. The result would be the same if the question had arisen upon a lease for years of

land. The evidence offered by the defendants at the trial should have been received. If such evidence shall be produced on a future trial, it will still be competent for the plaintiffs to show, if they are able, that the acts complained of as a disturbance of the rights of the lessee were done in the lawful exercise of a power to regulate the disposition of vessels in the public docks, under any ordinances or legal regulations which may exist upon that subject. We do not intend to express any opinion upon that question, the evidence not being before us. The judgment of the Superior Court must be reversed, and a new trial ordered in that court.

Judgment reversed.

Note: In *Koeber v. Sommers*, 108 Wis. 497, 52 L. R. A. 512; 84 N. W. 991, upon a statute similar to the New York statute, it was held that a lease for more than three years was a conveyance of real estate and that there was no implied covenant of enjoyment in such an instrument.

STOTT ET AL. v. RUTHERFORD.

92 U. S. 108; 23 L. Ed. 486. (1875)

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action of covenant brought upon an indenture of lease executed by the plaintiffs in error, and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant pleaded *non est factum*, and satisfaction of the claim of the plaintiffs by payment. Upon the trial, several bills of exception were taken by the defendant. They show that he made numerous points, all of which were overruled by the court. Only one of them requires consideration. He objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises, and that the instrument was, therefore a nullity. The court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiffs. The defendant moved for a new trial, and the case was heard by the full court in general term. That court ordered a judgment to be entered for the defend-

ant, *non obstante veredicto*. The plaintiffs, have brought the case before this court for review. The judgment of the court below proceeded solely upon the ground of the invalidity of the lease, and that subject is the only one argued here.

The lease created a term beginning on the first day of February, 1864, and to continue five years. It recites that the lessors, in making the lease, "were acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School." The leasehold premises are described as "being lot number four and part of lot number five," &c., "as now held by the parties of the first part," &c. The lessee covenants, among other things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate."

It was provided that the lessors might terminate the lease for non-payment of rent, or otherwise, at their option, by giving the requisite notice. The language of the grant was, "have granted, demised, and to farm let." The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. *Burney v. Keith*, 4 Wend. 502; *Grannis v. Clark*, 8 Cow. 36; *Young v. Hargrave's Adm.*, 7 Ohio Rep., pt. 2, 68.

The declaration avers, "that, by virtue of which said indenture, the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and was possessed thereof until about the first day of October, 1869, when he vacated such possession and occupancy, and the term of said lease was determined." This is not denied by the defendant's pleas, and is, therefore, according to a settled rule of the law of pleading, to be taken as admitted. The lessors executed the lease in their own names, and not as agents. They demised the premises in the same way. The rent was stipulated to be paid to them in their own right. The covenants of the lessee were all to them personally. If there had been a breach of the covenants of title and for quiet enjoyment, they would have been personally liable for the damages. The lessee entered into possession, and remained in possession, enjoying that possession as long as he chose to do so. He had, on his part, the full benefit of the contract.

When called upon to pay and perform as he had covenanted to do, he answered that the lessors had no title, and that he was in no wise responsible to them.

In *Laws v. Purser*, 6 Ell. & Bl. 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. After having done so, he refused to pay the royalty. The patentee sued him. He pleaded "that the letters-patent were void, and that he had a right to make and sell the article without the plaintiff's permission." The plaintiff demurred. The court said, "It would be monstrous if the defendant, after such an agreement acted upon, could on this ground refuse payment." The demurrer was sustained.

There are two answers to the defence relied upon in this case.

The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust to enable them the better to discharge the duties touching the property with which they were clothed. Every reasonable presumption is to be made in favor of the validity of the instrument which they executed. The act done pre-supposes the prior act necessary to give it validity. It is not stated in the bill of exceptions that the lessors had no paper title, but "that they possessed no estate whatever in said lands except such as pertained to the office of such committee, and have no estate therein in their individual capacity." The legal title in trust would be just such an estate as is here exceptionally and negatively indicated. We are all of the opinion that it is a fair inference from this language that the lessors had such an estate, or some other title in trust, sufficient to warrant their giving the lease and to render it valid.

We think the principle, that the lessee cannot dispute the title of his lessor, also applies. We see nothing to take the case out of this long-settled and salutary rule. *Williams v. Mayor, &c.*, 6 H. & J. 529; *Stewart v. Roderick*, 4 W. & S. 189; *Coburn v. Palmer*, 8 Cush 627. The rule applies with peculiar force where the lessor was in possession, and transferred that possession upon his faith in the validity of the lease to the lessee. *Taylor's Land. and Ten.*, sect. 707.

Whether the testimony set forth in the bill of exceptions, as to the title of the plaintiffs in error, was competent, is a question not raised before us and upon which we therefore express no opinion.

According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until

they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice, and the law.

Note: By many courts an implied covenant for quiet enjoyment arises from the relation of landlord and tenant.

Stewart v. Murphy, 95 Kan. 421; Am. Cas. 1917 C. 612; 148 Pac. 609; Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506.

SEC. 3. CONDITION AND USE OF PREMISES.

BLAKE v. DICK.

15 Montana, 236; 48 Am. St. Rep. 67; 38 Pac. 1072. (1894)

HUNT, J. The lease between Blake and Dick was the ordinary contract between landlord and tenant; there was therefore no implied warranty on the part of Blake that the dwelling-house leased was in tenantable condition, or would be kept in such condition; nor, at the time of the original contract between the parties, was there any obligation on Blake's part to make any repairs of the cellar or ground. These rules of law are too well settled to require a citation of authorities to support them: *Bowe v. Hunking*, 135 Mass. 383; 46 Am. Rep. 471, and cases cited.

Defendant, in his answer, having admitted the execution of the lease and nonpayment of rent, assumed the burden of proof to escape liability under its terms. He was asked "if there was any change in the condition of the basement about that time (meaning July, 1891) from what he found it." This question was objected to and the objection sustained, whereupon defendant made the following offer of proof:

"I now offer to show that these premises were so situated that any rain or storm was liable to flood this basement and render it unfit for use; that, at the time this defendant leased this building, it was warm, dry weather, and that defect was not apparent to him at the time; that tenants who had occupied the building before this defendant had occupied it complained, and were obliged to leave on account of a similar defect; that by the rain of about July 4th, this cellar was filled with filth, manure, mud, and water, which ran into

it from a stable-yard belonging to the plaintiff on the premises immediately adjoining; that the basement was filled with water to the depth of some six or eight feet, and also with the filth from the barn-yard; that it remained so for some week or ten days; that the plaintiff or his agent came there and offered to remove it, admitted that they were liable to remove it, and undertook to remove it; that they took it from the basement and spread it around in the yard of the premises, and left it in manure piles and piles of rubbish and garbage, and that these piles of rubbish and garbage so distributed upon the premises rendered the whole premises unfit for occupation, and that by reason of this change in the premises, making it dangerous to the health, and lives of the family of the defendant, he was obliged to and did surrender the premises to the plaintiff."

Plaintiff objected to the offer, upon the ground that such proof was irrelevant and immaterial, and, if established, would constitute no defense to the complaint. The court sustained this objection.

The defendant contends that because the facts in relation to the situation of the premises, and the construction of the dwelling-house, and the liability of the water to run down into the cellar, were not apparent to him at the time he leased the property, it became the duty of the landlord to disclose all such "defects" to him, and that, not having done so, he was guilty of fraud in procuring the lease. But the tenant cannot complain. The landlord did not warrant the condition of the premises; the tenant, by the evidence, inspected them; he took the risk of their condition: *Taylor's Landlord and Tenant*, sec. 328. We find no plea of concealment by the landlord of any fact of which the tenant did not have full opportunity of informing himself, and, accepting, as we do, all the facts to be true as pleaded and offered, in relation to the occasional rains causing draining of water into the cellar from the stable-yard of the landlord, there can be no deduction that, by reason of such overflow or drainage, there was any suppression of the truth, or any concealment of facts, or other conduct positively or inferentially fraudulent on the part of the plaintiff before or at the time of the execution of the lease. *Milliken v. Thorndike*, 103 Mass. 385, relied on by appellant, was decided upon a wholly different state of facts from that in this case. There the lessees set up that before the execution of the lease they had a conversation with the lessor, and that by the false representations of the lessor of material facts which he knew to be false when he made them, or positively affirmed as of his own knowledge, they were induced to sign the lease, and that such conduct was fraudulent, and

rendered the lease null and void. And the decision in that case was based entirely upon the ground that, by the deceit of the landlord and the abandonment of the premises immediately upon the discovery of the fraud, the defendant could obtain relief. The case has no application. Here, Blake, the landlord, was not obliged, by any relation of the parties to the lease under consideration, to remove the mud and filth from the cellar. His act in so doing was, therefore, gratuitous, and any agreement on his part to remove it was without consideration, and void; *Purcell v. English*, 86 Ind. 34; 44 Am. Rep. 255; *Wood's Landlord and Tenant*, sec. 382.

The further argument, that the landlord incurred a liability when he undertook to remedy the defect, but failed, might be applicable, under proper averments, in tort, upon the principle, however, that where a person has assumed to make repairs, and has failed to exercise a proper degree of care in making them, and injury results, redress is afforded the injured party, independent of any contract existing between the parties. But there is no such plea or contention before us.

The defendant next says that by the spreading of the filth upon the yard the premises became unfit for habitation, and more dangerous to the health and lives of the family of defendant, and thus a nuisance was created which constituted an eviction, and justified him in quitting the possession. The facts show, however, that the primary nuisance was the filth in the cellar. which made the premises unfit for use, and dangerous to health. For this condition and its causes the landlord was not liable, and where he cannot be held liable for the creation of the nuisance, we hold he cannot be held responsible for any act not negligently or wrongfully done involuntarily, by request of the tenant trying to abate it. Moreover, the conduct of the defendant Dick is inconsistent with the claim on his part that he was evicted. He swears that he left the premises in July, but after about ten days' absence returned, and remained in them until September. We are of opinion that by his return and stay he waived any rights he may have had to set up fraud, deceit, or eviction: *Wood's Landlord and Tenant*, sec. 481; *Gear on Landlord and Tenant*, sec. 160, and note.

Defendant finally pleads a surrender. He testified that, when the October bill for rent was rendered to him, he returned the key, writing at the foot of the bill rendered that he considered the house untenable, and refused to pay any more rent, and that he afterward saw a notice "For Rent" posted upon the premises. The key

and note were delivered to a Mr. Hopkins, who worked for Wallace & Thornburgh, from whom defendant hired the premises, and who appear to have offered the house for rent in September after defendant vacated. But no surrender is proved. The defendant did not establish any authority whatever in Hopkins to terminate the lease or to consent to the abandonment of the premises: *Thomas v. Nelson*, 69 N. Y. 118. Even granting that Hopkins, as clerk of the agents of the landlord, had authority to collect the rent from the defendant, such authority was a recognition of the existence of the contract, and that it would continue in force; but an agency to collect the rent of premises does not, by implication, and without further proof of authority, carry with it the right to accept a surrender, where a tenant, without legal justification, has quitted the premises before the term is completed: *Woodward v. Lindley*, 43 Ind. 333; *Baylis v. Prentice*, 75 N. Y. 604.

The appellant argues that the conduct of the landlord, however, in not returning the key, and in offering the house for rent, amounted to an acceptance and release. But it was not incumbent upon the landlord, if he got the key, to seek out the tenant and return it to him. And we hold that in the absence of any testimony of a surrender to the landlord himself, or of any acceptance of the premises by him, or by his authorized agents, proving an intent to consent to an abandonment by the tenant, the delivery of the key to Hopkins, and its retention, and a subsequent offer to rent, are not, without further evidence, sufficient to relieve the tenant of rent due under the lease for such time as the house was empty: *Nelson v. Thompson*, 23 Minn. 508; *Withers v. Larrabee*, 48 Me. 570; *Ladd v. Smith*, 6 Or. 316; *Bowen v. Clark*, 22 Or. 566; 29 Am. St. Rep. 625.

In conclusion, upon a review of the authorities and facts, we are of opinion that there was no eviction and no surrender by agreement, or by operation of law, and that the direction to the jury to find for the plaintiff was correct.

The order denying a motion for new trial and the judgment are affirmed.

Note: See *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770, 16 Am. St. Rep. 744, 23 N. E. 126, for the generally accepted doctrine in this country applied to the lease of a furnished house.

In Massachusetts the English rule is followed that where a house is rented as a furnished house there is an implied condition that it is fit for immediate habitation,

Ingalls v. Hobbs, 156 Mass. 348; 16 L. R. A. 51; 32 Am. St. Rep. 460; 31 N. E. 286.

DOYLE v. UNION PAC. RY. CO.

147 U. S. 413; 13 Sup. Ct. 333; 37 L. Ed. 223. (1893)

MR. JUSTICE SHIRAS delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow with a family of six children, agreed with the Union Pacific Railway Company to occupy the company's section house situated on the line of the railroad at or near Woodstock, in the county of Chaffee and State of Colorado, and to board at said section house such section hands and other employees of the company as it should desire at the rate of \$4.50 per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employees so to be boarded.

Mrs. Doyle moved with her children into the section house, and continued in the discharge of her duties as boarding-house keeper until the 10th day of March, A. D. 1884, when a snowslide overwhelmed the section house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the Circuit Court of the United States, for the district of Colorado, two actions against the Union Pacific Railway Company—one for her personal injuries; the other for damages suffered by her in the loss of her children—and which latter action was based on a statute of the State of Colorado.

The action resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writs of error. As the cases turn upon the same facts and principles of law, they can be disposed of together. * * *

The bill of exceptions was as follows:

"Be it remembered that on the trial of this cause, at the November term, A. D. 1886, of the said Circuit Court, the defendant admitted, and such admissions were received in evidence before the jury—

"That the plaintiff was at the several times named in the complaint a widow and the mother of Martin Doyle, Andrew Doyle,

Christopher Doyle, Catherine Doyle, Marcella Doyle, and Maggie Doyle mentioned and named in the complaint as the children of the plaintiff, and as having each and all been killed by a snowslide at Woodstock in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death; that each of said children was of the age and sex stated in the complaint; was each unmarried, and had no child or children, and had each lived with their said mother, making their home with her, up to the time of their death; and were each then living with the plaintiff, aiding and assisting her in and about making a living, and in and about her duties and labors in the keeping of the section house of the defendant at Woodstock, in the county of Chaffee and State of Colorado, where said children were killed; that said children were all killed while in said section house, on the 10th day of March, A. D. 1884, by a snowslide, which then and there occurred from the mountain side above said section house; that said section house was built and used by the defendant as and for a section house and a place at which the section hands of defendant who should work on said section could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant, and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section house for such section hands and other employees of the defendant as it should desire, at the rate of four and one-half dollars per week to be paid by the persons so furnished with such board; but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section house with her family, and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snowslide on the 10th day of March, A. D. 1884; that the defendant did not at any time notify or apprise the plaintiff or either of her said children, or cause her or either of them to be notified or apprised, of the danger of a snowslide or snowslides or of the liability of a snowslide or snowslides at such place where said

section house then was, or in that locality. And the plaintiff, further to maintain the issue on her part, introduced evidence tending to show that said section house was a one-story frame building, and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the sides of the mountain at the base of which was the house in question were marked by the tracks of former snowslides, but only those familiar with snowslides and their effects would know what they meant; that the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section house; that the plaintiff and her said children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the danger incident thereto, and was not aware of the particular danger in question; that there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section house, which cut off a view of the mountain side above said hip from the section house or its immediate vicinity; that above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tending to create snowslides of danger to persons in said section house or its vicinity; that this danger was not apparent even to a person having knowledge of snowslides and their causes without a view or examination of this mountain side above said hip; that the altitude of said section house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet; that the snowfall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting; that the snowslide of March 10, 1884, which killed the said children, proceeded from this depression above said hip; that a snowslide of less dimensions, and of less scope and extent, occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section house, and of which the defendant had knowledge at the time thereof.

“That the attention of the superintendent of the construction of said railroad and of said section house was called to the fact of such danger, at or about the time said section house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

"That her said son Andrew Doyle was an employee of the defendant—a section hand on the same section where said section house was located—at the time he was so killed by said snowslide; that the plaintiff and her said children were in said section house at the time the said children were killed, and that none of said children were aware of said danger before the said snowslide of March 10, 1884, occurred.

"That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section house, but became wider after leaving the hip; that with this draw another draw united about midway between the section house and the said hip, and formed one draw from their point of union to the section house.

"That this mountain is a part of the range of mountains known as the 'Continental Divide', which divides the waters of the Atlantic from those of the Pacific. At this point above Woodstock station the course of the mountain is nearly east and west. This railroad passes this mountain by means of a tunnel called 'Alpine Tunnel', which is to the westward of a line north of Woodstock, and descends this mountain at a heavy grade, along the side thereof, about midway between the section house and the said hip on the mountain (which hip is termed a 'Projection of Rocks', by some of the witnesses), and passes on to the eastward of Woodstock a considerable distance, where it turns, and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section house and said hip,—the section house being below and distant from this lower track about two hundred and thirty feet—and the two tracks forming this horseshoe are both between the section house and said hip, and on a direct line from the section house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section house to the hip on the mountain side above; that there was a water tank on the upper side of the lower track fifty or sixty feet to the westward of the section house, which water tank was injured by the snowslide of February, 1883.

"That the snowslide of March 10, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section house was not far from the center of said snowslide track.

"That the contour of this mountain, beginning at the section house and ascending the mountain, is about as follows, to wit: Above the

section house it slopes slowly to the first railroad track; then there is a rockslide; then there is a bench above that, and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks (the hip on the mountain side), and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber, and in and about the section house there is a space of eight or nine hundred feet square on which there is no timber except three or four trees.

"That the timber on the mountain side was sparse and scattered; that only a few trees were carried down by the snowslide; that snowslides do not always follow beaten tracks made by former snowslides on the same mountain side but frequently depart therefrom; that the snowslide of March 10, 1884, separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section house, resulting in the injuries complained of.

"That the winter of 1883-4 was severer, and the snow fell some deeper, than the winter previous thereto, and that it snowed heavily and continuously from about the 1st of March, to the 10th of March, 1884, and the trains had ceased to run on account of the snow; that ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift, and after it had settled compactly; that it drifted greatly, filling up basins and depressions on the mountain sides; that there were rockslides and existing evidences of former snowslides on this mountain side above said section house.

"That the snowslide of February, 1883, deposited snow and debris on the upper track of the railroad above said section house from twenty to twenty-five feet deep; and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

"And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section house was built below the said tracks and behind, and protected by a thick growth of timber above and between said section house and the mountain; that there were no marks or tracks of former snowslides directly above or in the vicinity of said section house; that the defendant was not aware of any danger from snowslides at the place where the section house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built, and the contour of the mountains above the same to the summit of the range, and that said section house was built at that place because the officers of the company thought that it was a safe place, and could not be endangered by snowslides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snowslides which might occur on the mountain sides above said section house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built, and above, on the mountain side, showed that there had not been a snowslide there for at least two hundred years; that the snowslide of March 10, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snowslide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snowslide in 1883 did no damage except to cover up a short distance of the railroad track, and break in some boards of the house under the water tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snowslides at the place where said section house was built, but that the conversation or notice referred to was in regard to a place a mile or more farther up Quartz Creek; that the said Andrew Doyle had been an employee of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow, and all attempts to open it having been abandoned, and for ten days or more before the snowslide no work whatever was being done by defendant on said road for a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section house and its immediate locality from snowslides; that there was no chasm or draw immediately above

said section house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section house; that said section house was broken down by said snowslide of March 10, 1884, by a spreading out of the snow as it came down the mountain, and that said section house was on the southerly side of said snowslide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or 'prominence;' that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section house and the first railroad track, and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rockslides or existing evidences of former snowslides on the mountain sides immediately above said section house.

"And the foregoing was all the evidence in the case".

To the answers of the court to the prayers for instructions, and to the charge, the plaintiff has filed 13 assignments of error.

The twelfth assignment alleges that "the Circuit Court erred in charging the jury substantially to the effect that they must find for the defendant," and in the brief of the plaintiff in error it is asserted that the answers of the court to the several requests for instructions were in effect directions to the jury to find for the defendant.

Although, in point of fact, the court did not give the jury peremptory instructions to find for the defendant, but left the cases to them on instructions under which they might have found verdicts for the plaintiff, yet the validity of the plaintiff's exceptions to the court's treatment of the cases may be conveniently tested by assuming, for the present, that the charge and instructions legally amounted to a direction to find for the defendant. If an examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in so doing, it will not be necessary to consider each and every assignment of error, nor to minutely scan isolated expressions used by the court.

The first question to be determined is, what was the relation between the plaintiff and the railway company? Was Mrs. Doyle a servant or employee of the company, aiding in the transaction of its business and subject to its directions, or was she a tenant at will holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not

interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding money out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company, or change her relation to the company as a tenant at will of the company's house. Such an arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snowslide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation, or deceit on the part of the defendant company as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section house was built near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snowslides or of the liability of snowslides at such place where said section then was, or in that locality. Upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of carelessness or disregard of duty towards the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. The law is thus stated in a well-known work on Landlord and Tenant:

"There is no implied warranty, on the letting of a house, that it is

safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let; and where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent; and in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee." *Tayl. Landl. & Ten.*, section 382.

The principles applicable to the present case have been well stated in the recent case of *Bowe v. Hunking*, 135 Mass, 380. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the Supreme Court sustained this ruling. Field, J., giving the opinion of the court, said (page 383):

"There is no warranty implied in letting of an unfurnished house or tenement that it is reasonably fit for use (citing cases). The ten-

ant takes an estate in the premises hired and persons who occupy by his permission or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises (citing cases).

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase. This duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction, as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and *Keates v. Earl of Cadogan*, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See, also, *Robbins v. Jones*, 15 C. B. (N. S.) 240. This is the general rule of *caveat emptor*. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. *Hight v. Bacon*, 126 Mass. 10; *Ward v. Hobbs*, 3 Q. B. Div. 150; *Howard v. Emerson*, 110 Mass. 320. This rule does not apply to cases of fraud."

This rule of *caveat emptor* has been applied also in many other cases, some of which we now refer to.

Keates v. Earl of Cadogan, above cited, was an action on the case. The declaration stated in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and was likely to fall and thereby do damage to persons and property therein; that the plaintiff

was without any knowledge, notice or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration, and the court unanimously sustained the demurrer. Jervis, C. J., giving the opinion, said (page 600):

"It is not pretended that there was any warranty, express or implied that the house was fit for immediate occupation, but it is said that because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit; it was a mere ordinary transaction of letting and hiring."

* * *

In the recent case of *Viterbo v. Friedlander*, 120 U. S. 712; 7 Sup. Ct. Rep. 962, Mr. Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides which was known only to the railway company, and which could not have been ascertained by the plaintiff. It was, indeed, alleged that "the section house was in a place of danger from snowslides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would

not have justified a verdict on the ground of negligence or a fraudulent suppression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for defendant. * * *

No error being disclosed by these records, the judgment of the court below is in each case affirmed.

Note: In *Cowen v. Sunderland*, 145 Mass. 365; 1 Am. St. Rep. 469; 14 N. E. 117 (1887), an action was brought by a tenant for injuries received by falling into a cesspool on the premises rented from the defendant. The evidence showed that the plaintiff did not know of the existence of the cesspool; that it was in a yard covered with from four (4) to six (6) inches of earth on which grass and weeds were growing and presented the same appearance as the rest of the yard; that it was where she passed over it in her use of the yard; that the boards which covered it and on which the earth rested were rotten and decayed; and that in stepping upon this covering of the cesspool she sank into it and was injured. There was further evidence that this covering had been replaced with old boards sometime before by the defendant's direction, and that the defendant was present when this was done. The opinion of the court holds: That it was proper to submit to a jury the question whether the defendant knew the defective covering of the cesspool and the danger therefrom, and had negligently omitted to inform the plaintiff, and whether the plaintiff herself, making careful examination, had been injured thereby by reason of want of proper information.

See also: *Howell v. Schneider*, 24 App. D. C. 532, where the tenant was injured by the falling of a flush tank in the bathroom. This tank had been substituted for an older tank, some two (2) years before. The unskillful manner of its attachment was concealed from view and the fact that it had become slightly detached was not known to the landlord. It was held that the defective construction was equally open to the observation of the tenant as to that of the landlord, and there was nothing to charge him with actual knowledge. He was accordingly held not responsible for the injury.

UNITED STATES v. BOSTWICK.

94 U. S. 65; 24 L. Ed. 65. (1876)

CHIEF JUSTICE WAITE delivered the opinion of the court:

* * * This being the case, the contract is one by which Mr. Lovett agreed to let, and the United States to hire, the premises described for the term of one year, with the privilege of three, at a rent of \$500 a month, and without restriction as to the use to which the property might be put. The United States agree to nothing in express terms, except to pay rent and hold for one year.

But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." Com. Land. & Ten. 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford v. Dunnett*, 7 M. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. *Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 Marsh, 569.

There are in this contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to use the property for any and all purposes, but were bound to so conduct themselves in such use as not to cause unnecessary injury. Whatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant, while using the property, will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim *sic utere tuo ut alienum non laedas*. If he fails in this, he violates his contract, and must respond accordingly.

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All

obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon.

Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record. *

* *

As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account.

* * *

It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action. The amount of this damage has not been found.

* * *

SEC. 4. ASSIGNMENT AND SUBLETTING.

GARNER v. BYARD.

23 *Ga.* 289; 68 *Am. Dec.* 528. (1857)

By Court, LUMPKIN, J. * * * Amongst other things, the court charged the jury in this case that the defendant Garner had no right to

sublet the premises, for the rent of which the note was given, to a stranger, without the consent of the landlord, and that the refusal of the plaintiff to deliver possession for that purpose did not constitute a failure of the consideration of the note. Is this true? For upon this proposition the case hangs?

In Smith's Law of Landlord and Tenant, 356, the doctrine upon this subject is thus correctly stated: "But though a lease is necessarily a contract, yet it is a contract which creates an estate; and by the law of England an estate is assignable, although a contract is not so. And the landlord, therefore, may assign even his estate in remainder; the tenant his estate in his turn; and thus the parties to the relation may be altered, either by a change of landlord or a change of tenant."

True, the tenant cannot substitute a new paymaster without the acceptance of the landlord; but this was not proposed in this case. Garner was to remain bound for the rent. If, then, Byard refused to deliver possession, except upon terms which he had no right to exact, but used and occupied the premises himself, Garner had a right to repudiate the contract, which he did; and the consideration of the note has failed.

Judgment reversed.

STEWART v. LONG ISLAND RAILROAD COMPANY.

102 N. Y. 601; 55 Am. Rep. 844; 8 N. E. 200. (1886.)

RAPALLO, J. The only question in this case is whether the defendant, by entering into the contract of May, 1876, with the Flushing, North Shore and Central Railroad Company, came into such a relation with the original lessor of the railroad in question, represented by the plaintiff, as to subject it to liability directly to her for the rent reserved by the original lease of January, 1873, from her deviser, Alexander T. Stewart, to the Central Railroad Company of Long Island. The facts are so fully stated in the opinion of my learned brother Finch, J., that it is not necessary to repeat them in detail.

That the contract of A. T. Stewart with the Central Railroad Company of Long Island dated January, 1873, was a lease of the road for the term of fifty years, cannot, I think, be disputed, and

thus far in the discussions in this court it has been conceded. The annual rent reserved was a percentage upon the agreed cost of the road, liable to be augmented by a percentage upon such further expenditures as might be made by the landlord during the term. If this had been all of the contract there would have been no difference of opinion between us; but it contained further provisions which have given rise to the present discussion.

The ordinary covenant to surrender the demised premises on the last day of the term was made subject to the further provisions of the contract, which were that the lessee covenanted at the expiration of the said term of fifty years from January 7, 1873, to pay to the lessor the principal sum by him expended on the road, and that upon such payment, but not before, the payment of rent should thereafter cease, such rent however to be paid up to such time, and that upon such payment of such principal sum the lessee, its successors or assigns, should not surrender the said demised premises, but should be vested with the fee-simple of the right of way and all the property appurtenant thereto, owned by the lessor, and that the contract should thereupon, and upon such payment, be deemed a sufficient grant or deed of conveyance, and that the lessor should then execute such further deed as might be necessary, etc.

Until the payment of the principal sum however, the rent was to continue, and the lease contained the usual provisions for re-entry for non-payment of rent or the breach of the other covenants in the instrument, which were numerous.

In June, 1874, the entire interest of the Central Company, under this lease and contract, became vested in the Flushing, North Shore and Central Railroad Company, to whom the contract was assigned, and in May, 1876, the latter company entered into the agreement with the defendant which is set forth in the opinion of Finch, J., and the effect of which is now in question. The main feature of that agreement to which it is necessary for the purposes of this discussion to refer, is that the last-named company leased to the defendant the whole of the property which was demised by Stewart to the Central Railroad Company, and for a term longer than that of the original lease, viz., for the term of ninety-nine years. It thus transferred to the defendant the entire term during which the Central Railroad Company was to hold the demised premises as lessee of Alexander T. Stewart, and left no particle of that term in the original lessee or in its first assignee, the Flushing, North Shore and Central Railroad Company, and the question now before us is, whether it operated, as

between the original lessor, Stewart, or his devisee, and the defendant, as an assignment of that entire term, and thus established a privity of estate between them which rendered the defendant liable to the original lessor, or whether it was, as between those parties, a mere sub-lease under which the defendant was liable only to its immediate lessor.

The rules relating to the effect of an assignment of a lease are so well settled that it is hardly necessary to do more than refer to them. Where a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original landlord has no right of action against the sub-lessee, there being neither privity of contract nor of estate between them. Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease. The question has frequently, and probably most generally, arisen between the lessee and his transferee, and much confusion will be avoided by observing the distinction between those cases, and cases where the question has been between the transferee and the original landlord. In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by its reserving a new rent to the assignor with a power of re-entering for non-payment, nor by its assuming, by the use of the word demise or otherwise, the character of a sub-lease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent. *Taylor's Landl. & Ten.* (7th ed.) 109; *Hicks v. Downing*, 1 Lord Raym. 99; *Palmer v. Edwards*, 1 Doug. 187; *Smith v. Mapleback*, 1 T. R. 441; *Porter v. French*, 9 Irish Law. R. 514; *Parmenter v. Weber*, 8 Taunt. 593; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wallaston v. Hakewell*, 3 Scott N. R. 616; *Pluck v. Digges*, 5 Bligh (N. S.) 31; *Beaumont v. Marquis of Salisbury*, 19 Beav. 198; *Thorne v. Woolcombe*, 3 Barn. & Ald. 586.

But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights, will arise between them.

The effect therefore of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended. *Taylor Landl. & Ten.* (7th ed.) 109; notes 16 n. 5; 1 Washb. Real Estate, 515 (4th ed.), n. 6; *Adams v. Beach*; 1 Phil. 99, 178; *Indianapolis, etc., R. Co. v. Cleveland, etc., R. Co.*, 45 Ind. 281; *Lee v. Payn*, 4 Mich. 106; *Lloyd v. Cozens*, 2 Ashm. 138; *Wood Landl. and Ten.* (Banks' ed.), 347. These rules are fully recognized in this State. *Prescott v. De Forest*, 16 Johns, 159; *Bedford v. Terhune*, 30 N. Y. 453, 457; *Davis v. Morris*, 36 N. Y. 569; *Woodhull v. Rosenthal*, 61 N. Y. 382, 391, 392.

There can be no doubt that in the present case the original lessee of Stewart parted with its whole term of fifty years and that the defendant acquired it. The Central Railroad Company assigned the entire contract, embracing the term of fifty years, as well as the right of purchase of the fee at the end of the fifty years, to the Flushing, North Shore and Central Railroad Company, and I do not understand it to be denied by any one that that company became liable to Stewart directly on the covenants in the lease as assignee of the entire interest of the lessee. But the Flushing, North Shore and Central Railroad Company, by its contract with the defendant, did not assign to the latter the right of purchase at the end of the term of fifty years. It however leased the road to the defendant for the term of ninety-nine years, and the defendant covenanted to surrender the demised premises to its immediate lessor at the end of the ninety-nine years. That term however being greater than the term of fifty years granted in the original lease, the instrument operated as an assignment of that term, and left no reversion therein in the Flushing, North Shore and Central Railroad Company, consequently during the continuance of the term of fifty years there was a perfect privity of estate between the defendant and the original lessor, and the legal estate in reversion was in the original lessor during the fifty years, and he or those succeeding to his estate were both legally and equitably entitled to the rents and had a right of action therefor directly against the defendant by reason of this privity of estate.

It is contended that the Flushing, North Shore and Central Railroad Company, as the assignee of the Central Railroad Company, had more than the term of fifty years granted in the original lease because it was also assignee of the contract of Stewart by which, in case at the end of the term the Central Railroad Company should have performed the covenants in the lease and should then pay to Stewart the principal sum expended by him in the construction of the road, the contract should operate as a conveyance in fee of the demised premises. That under this contract the Flushing, North Shore and Central Railroad Company was the equitable owner of the fee as well as of the term, and was in possession under both titles when it leased to the defendant; that the lease to the defendant, being for only ninety-nine years, did not transfer its entire interest in the premises, but left in it a reversion at the expiration of that term, at which time the defendant covenanted to surrender to it, and consequently its lease to the defendant was not an assignment but a sub-lease. That argument would be very forcible if the question arose between the defendant and the Flushing, North Shore and Central Railroad Company, and were whether the relation of landlord and tenant subsisted between them. But it has no application to the question upon which this case turns. The equitable estate in reversion claimed to be in the Flushing, North Shore and Central Railroad Company as purchaser, is not a reversion in the term of fifty years. The whole of that term has been transferred to the defendant, not a particle of it is retained by its immediate lessor, and there is absolutely nothing intervening between the estate of the defendant, as assignee of the lessee for the fifty years, and the legal estate in reversion of the original lessor or his devisee; and the right to the rents follows that legal estate in reversion. The owners of the equitable estate claimed have no right, legal or equitable, to the rents. During the term of fifty years the original lessor or his devisee are entitled to them, and the whole term of fifty years being vested in the defendant, it is directly liable to the holder of the legal estate in reversion, there being a privity of estate between them. If a present equitable right to the rents were vested in the same parties in whom the equitable estate in reversion is alleged to be vested, different questions might arise. The fact that the lease to the defendant reserves a different rent from that reserved in the original lease, with a clause for re-entry, cannot affect the question as between the parties to the present controversy, of its operating in law as an assignment of the term.

These points were expressly adjudicated in the case of *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wollaston v. Hakewell*, 3 Scott N. R. 616. Neither can the covenant to surrender have any bearing. It was a covenant to surrender at the expiration of the ninety-nine years' lease, long after the expiration of the fifty years' lease. Where in an assignment of a lease or in a demise by the lessee for the same term as that granted by the original lease, there is a covenant to surrender to the assignor, this has in some cases been held to prevent the sub-lease from operating as an assignment; but this has been because the whole instrument, taken together, has been held to reserve to the original lessee some fragment of the original term, though almost inappreciable in point of duration, as in the case of *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303, where the assignee of a lease demised the premises for the residue of his term, reserving the right to a delivery of possession by his assignee to him on the last day of the term, and a right to intermediate possession in case the buildings should be destroyed by fire. These reservations were held sufficient to characterize the demise as a sub-lease and not an assignment. The right to possession on the last day would leave a fragment of that day of the term in the assignor, and was sufficient to create a technical reversion and thus prevent a privity of estate between his lessee and the original lessor.

In *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407, the sub-lease was of part of the demised premises and was for only two years and seven months out of a term of ten years and expired four years before the original lease, but the sub-lessee had the privilege of four years more, provided he gave two months' notice. The action was ejectment brought by the original lessor against an assignee of the second lessee, claiming that the original lease had been forfeited by the breach of a covenant, on the part of the lessee, which it contained, that he would not sub-let or re-let the demised premises or any part thereof without written consent, etc., under penalty of forfeiture of the term, and the sub-lease before referred to was claimed to be a breach of that covenant. The judgment below was for the landlord but it was reversed in this court on the ground that the alleged forfeiture had been waived by the landlord. In the opinion, the question is discussed whether the sub-lease amounted to an assignment of the term of the original lease, or a mere sub-letting or re-letting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling, but in discussing it the learned judge delivering the opinion made some re-

marks touching the effect of reserving a new rent in the sub-lease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument, which are above referred to, would be proper subjects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz.: Whether the second lease was a sub-letting or re-letting of part of the demised premises, which constituted a breach of the covenant not to sub-let or re-let. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of that question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to re-entry for breach of condition are immaterial. *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wollaston v. Hakewell*, 3 Scott's N. R. 616; *Prescott v. De Forest*, 16 Johns. 159; *Bacon Abr.*, Leases, 1, 3; *Palmer v. Edwards*, 1 Doug. 187; *Smith v. Mapleback*, 1 Term R. 441; *Smiley v. Van Winkle*, 6 Cal. 605; *Lloyd v. Cozens*, 2 Ashm. 138; 2 *Preston Con.* 124; *Taylor Landl. and Ten.* (7th ed.) 109; 1 *Washb. Real Prop.* 515, 6. The cases which hold that where a lessee sub-leases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sub-lease does not operate as an assignment, proceed upon the theory that by reason of this covenant to surrender some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sub-lessee would surrender the demised premises on the last day of the term.

In *Piggott v. Mason*, 1 Paige, 412, by the original lease, the lessee had thirty days after the expiration of the lease to remove buildings from the demised premises. His assignee sub-leased for the residue of the term, and his lessee covenanted to surrender possession "on the last day of the term."

In *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303, the covenant of the sub-lessee was that "on the last day of his term he would surrender the possession of the demised premises to his lessor." Page 395.

Some fragment of that last day was therefore reserved to the original lessee, for he was entitled to the surrender during some portion

of the last day. This was held sufficient to establish a technical reversion in the original lessee and thus prevent a privity of estate from arising between his lessee and the original landlord. The same theory has been subsequently adopted in cases where the language of the covenant has been that the second lessee would surrender to his lessor at the expiration of the term of the sub-lease, without adverting to any distinction.

In *Ganson v. Tift*, 71 N. Y. 48, 54, the sub-lease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessor, and the court say: "This constitutes a sub-lease of the premises, and not an assignment of the entire term."

It is obvious that the covenant to surrender cannot, in the present case, have the effect which was given to it in the cases cited, for it was to surrender at the expiration of a term of ninety-nine years, the original lease being for only fifty years, and there is no theory upon which it can be pretended that any vestige of that term or of any reversion therein remains in the lessor of the defendant.

The agreement to transfer the fee to the lessee did not merge the term of fifty years, nor prevent the relation of landlord and tenant subsisting between the original lessee or its transferee of the term, during its continuance. The lessee was to become entitled to the fee only in case it performed the covenants and paid the principal of the cost of the road, and the lease provides in terms that on such payment being made, but not before, the rent reserved in the lease shall cease. The payment of this principal sum at the end of the fifty years, as well as of the other sums reserved, was by the very terms of the contract made a condition precedent to the vesting of the fee in the lessee. In this respect the case does not differ in substance from *Bostwick v. Frankfield*, 74 N. Y. 207, where a similar covenant to convey a fee to the lessee was held not to create an equitable estate in fee in the lessee, in which his estate as lessee merged, but that the lease remained in full force, and the relation of landlord and tenant continued, until performance of the contract of purchase, and the landlord was entitled to dispossess the lessee by summary proceedings against him as tenant. In that case it was held that the doctrine which treats an individual, who has contracted for the purchase of land as the owner, could not be applied when the intention of the parties was clearly adverse to such a presumption, and that a provision in the contract, that unless carried out at the time named, it should become void, negatived such an intention. Here

the provision is that the lessee shall hold as tenant for the term of fifty years, paying rent, and at the end of the fifty years the lessee shall pay to the lessor the principal sum by him expended upon the road, and that upon such payment "but not before" the rent should cease, such rent however to be paid up to such time, and upon such payment of the said principal sum the lessee to be vested with the title; the right to re-enter for non-payment of rent or breach of covenants being fully reserved.

These provisions plainly manifest an intention that no title, except an estate for years, shall vest in the lessee until the end of the term and the payment of the principal and all rent in arrears, and that in the meantime the fee and the reversion shall remain in the lessor. Until the expiration of the term the only estate which vested in the lessee was an estate for years, which was entirely separable from the right to acquire the fee. The lessee could assign the term and retain the contract for the purchase of the fee, and by such an assignment the assignee would be brought into privity with the original landlord who would be entitled to his action directly against the assignee of the term so long as it continued such assignee. It could divest itself of this liability at any time before rent had accrued by assigning over the term, but so long as it continued to hold the term it held as tenant of the original landlord, and was subject to be proceeded against as such. The original lessee, or the lessor of the defendant, as has been shown, retained no portion of the term and consequently no reversion. Whatever equitable rights it may have had were to arise *in futuro*. An estate to arise *in futuro* cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and the person to whom he has assigned his term, so far as strictly reversionary rights are concerned, or prevent that relation from existing between such person and the original landlord. * * *

SEC. 5. COVENANTS RUNNING WITH THE LAND.

SPENCER'S CASE.

5 *Coke*, 16; 1 *Smith's Leading Cases*, 115. (1583)

Spencer and his wife brought an action of covenant against Clark, assignee to J. assignee to S., and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of the wife) to S. for term of twenty-one years, by which indenture S. covenanted for him, his executors, and administrators, with the plaintiffs, that he, his executors, administrators or assigns, would build a brick wall upon part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee; and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not, and where he shall not be bound, although he be expressly named, and where not.

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant; but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *Warrantia Chartae*, F. N. B. 135, & 9 E. 2; Garr' de Charters, 30, 36 E. 3; Garr, 1, 4 H. 8; Dyer 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods, there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors, or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee. And

it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee.

4. It was resolved, that if a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease for years by this word *concessi* or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of Covenant: for the lessee and his assignee hath the yearly profits of the land, which shall grow by his labour and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labour, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant, as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the courtesy, or any other who comes in in the post, shall not vouch (which is in lieu of an action). But if award be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word grant although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute-merchant or statute-staple or *elegit* of a term, and he to whom a lease for years is sold, by force of an execution, shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law; as if a man grant to lessee for years, that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.

6. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they, who shall take benefit of such covenant when the

lessor makes it with the lessee, should on the other side, be bound by the like covenants when the lessee makes it with the lessor.

7. It was resolved, that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (assignees), for the same right which was in the testator, or intestate, shall go to his executors or administrators; as if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee; the same law of the assignee of the heir of the feoffee, and of every assignee. So every one of them shall have a writ of *Warrantia Chartae*. Vide 14 E. 3, Garr. 33; 38 E. 3, 21; 36 E. 3, Garr. 1; 13 E. 1, Garr. 93; 19 E. 2, Garr. 85; &c. For the same rights, which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue; but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example in 42 E. 3, 3, the case is; grandfather, father, and two sons. The grandfather was seised of the manor of D., whereof a chapel was parcel; a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeofe one of the manor in fee, who gave it the younger son and his wife in tail; and it was adjudged, that the tenants in tail as terre-tenants (for the elder brother was heir), should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And Finchden related, that he had seen it adjudged, that two coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case

cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 H. 4, 6, b. But there it is agreed, that if the covenant had been with the lord of the manor of D, and his heirs, lords of the manor of D., and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant without privity of blood. Vide 29 E. 3, 48, and 30 E. 3, 14. Simpkin Simeon's case, where the case was, that the Lady Bardolf, by deed, granted a ward to a woman who married Simpkin Simeon, against whom the queen brought a writ of right of ward, and they vouched the Lady Bardolf, and afterwards the wife died, by which the chattel real survived to the husband (and resolved that the writ should not abate), the vouchee appeared and said, what have you to bind me to warranty? The husband showed, how that the lady granted to his wife, before marriage, the said ward; the vouchee demanded judgment for two causes.

1. Because no word of warranty was in the deed; as to that it was adjudged that this word (grant) in this case of grant of a ward (being a chattel real), did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privy. As to that it was adjudged, that he should vouch, for this warranty implied in this word (grant), is in case of a chattel real so annexed to the land, that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole court, that this word (*concessi* or *demisi*), in case of freehold or inheritance, doth not import any warranty. * * *

SEC. 6. ESTOPPEL TO DENY LANDLORD'S TITLE.

WINSTON v. PRESIDENT AND TRUSTEES OF FRANKLIN ACADEMY.

28 Miss. 118; 61 Am. Dec. 540. (1854)

FISHER, J. The plaintiffs below brought this suit in the Circuit Court of Lowndes county, to recover damages for injuries done to a lot of ground situated in the town of Columbus, of which it is alleged they are the owners. The defendant below demurred to the complaint, assigning various causes of demurrer, all of which were

overruled by the court below. The facts, as shown by the complaint and the exhibit filed therewith, are as follows: The lot is part of the sixteenth section donated for the use of schools, which, it appears from the pleadings, is under the control and management of the plaintiffs. Indeed, it is alleged that the title and reversionary interest are in them. On the sixth of April, 1841, the plaintiffs leased the lot to one Abraham Wolf, and his lease covenants, among other things, that he will pay in advance annually the sum of twenty-five dollars on the first day of August in every year, for the unexpired term of ninety-nine years from the first day of August, 1821; that on failure so to pay, the lessors were to have the right to re-enter and to become reinvested with their former title, and to hold the lot "discharged from all claim of the said Wolf, his executors, administrators, or assigns." Wolf leased the lot to one Walter C. Winston, who died, having first made his will and appointed the defendant below executor thereof. He, as executor, took possession of the lot, and while thus in possession removed therefrom buildings situated thereon, alleged to be of the value of five hundred dollars. In the meantime there was a failure to pay the rent according to the stipulations of the lease; and it is further alleged that Wolf has left the state, leaving behind no property or other means out of which the rent can be made. It is also alleged that Winston refuses to pay the rent as covenanted by Wolf.

The rules of law applicable to this state of case are too well settled to require argument or even the citation of authority. The tenant, except, in a few special cases, can never dispute the title of his landlord. Wolf, by taking the lease, admitted the plaintiff's title to the lot. Walter C. Winston, coming in possession under Wolf, was bound by the covenants contained in the lease of the latter, and the defendant is bound by everything which bound his testator. The failure to pay the rent gave the plaintiffs the right to re-enter and to become reinvested with their former estate; and they were therefore entitled to recover damages according to the injury which the property had sustained at the time this right accrued. The removal or destruction of the buildings on the lot was an injury which must be estimated with reference to the time when the plaintiffs would become or had become entitled to the possession and enjoyment of the property. The injury at the expiration of the term of ninety-years might have been a very trivial one, as the buildings during that time might have been destroyed by the laws of decay. As a compensation for such loss, however, would have been the annual rent of the property.

The complaint alleges that in consequence of the removal of the buildings the plaintiffs are prevented from again leasing the lot, except at a reduced price. This is of course the result of the defendant's trespass, which operated to the immediate injury of the plaintiffs in rendering their property less valuable or less productive than it otherwise would have been.

We are therefore of opinion that the court below committed no error in overruling the demurrer. All the other questions were proper for the consideration of the jury; and they, to say the most, not having abused their discretion in the matter, we are of opinion that the judgment of the court below ought to be affirmed.

Judgment affirmed.

Note: There is an extensive note on the subject of Estoppel of Tenant to Deny Landlord's Title in 89 Am. St. Rep. 62.

LAMSON v. CLARKSON.

113 Mass. 348; 18 Am. Rep. 499. (1873)

GRAY, C. J. The question presented by this case is, whether a tenant, who has executed an indenture of lease for a year, and covenanted thereby to pay a certain rent quarterly, and has occupied the premises until the end of the term, is estopped to show that his landlord's only title was an estate for the life of another, which expired during the term, and thereby to justify himself in not paying to the landlord rent subsequently accrued. And we are of opinion that he is not so estopped.

So far as the estoppel of the tenant to deny his landlord's title is an estoppel *in pais*, it arises out of his having entered into possession under that title at the beginning of the lease; and he does not deny that the landlord had a title at that time, by alleging and proving that it has since expired. Hilbourn v. Fogg, 99 Mass. 11; Grundin v. Curter, id. 15.

So far as it is an estoppel by deed, it arises out of the execution of the indenture; and some interest, as the tenant admits, having passed by the deed, he is not estopped to show what the quantity and duration of that interest was, and that it expired before the rent accrued, which the landlord now seeks to recover. Treport's case, 6

Co. 14b, 15a; *Smalman v. Agburrow*, 1 Rol. R. 441, 442, *ad fin.*, and 3 Bulst. 272, 275; *Brudnell v. Roberts*, 2 Wils. 143; *Blake v. Foster*, 8 T. R. 487; *Doe v. Seaton*, 2 C., M. & R. 728, and *Tyrwh, & Gr.* 19; *Langford v. Selmes*, 3 K. & J. 220, 226; 2 Saund 418, note; 1 Platt on Leases, 94. The tenant's covenant is only to pay a certain sum as rent, and, in the words of Doderidge, J., in 3 Bulst. 274, "if it be so that the estate be ended, the contract for the rent will end also, this being but *quid pro quo*, *sc.* the rent for the land." Upon the termination of the landlord's estate, the tenant became a tenant at sufferance, and no longer liable for rent under the covenants in the indenture. *Vin. Abr.*, Debt. B. pl. 4; *Page v. Wight*, 14 Allen, 132, 134.

No adjudication inconsistent with these views was referred to in the learned arguments at the bar. In *Morse v. Goddard*, 13 Metc. 177, in *George v. Putney*, 4 Cush. 351, and in many cases in other courts, cited for the plaintiff, the tenant, having been evicted by, or attorned in good faith to, one who had a paramount title, was held to be thereby excused from payment of subsequent rent, whether that title vested before or after the beginning of the lease; and no decision was made or required upon the question whether, without such eviction or attornment, he could have relied on the expiration of the landlord's title during the term. In *Binney v. Chapman*, 5 Pick 124, the tenant, after notice of the adverse title, had made a new agreement to continue to hold of his landlord.

Exceptions sustained.

Note: *Johnson v. Riddle*, 240 U. S. 467; 36 Sup. Ct. Rep. 393; 60 L. ed. 752.

In this case it was said: "But a tenant is not estopped to show that his landlord's title has expired or has terminated by operation of law." *England ex dem. Syburn v. Slade*, 4 T. R. 682; *Blake v. Foster*, 8 T. R. 487, 5 Revised Rep. 419; *Neave v. Moss*, 1 Bing. 360, S. J. B. Moore, 389, 2 L. J. C. P. 25; *Hopcroft v. Keyes*, 9 Bing. 613, 2 Moore & S. 760; *Doe ex dem. Higginbotham v. Barton*, 11 Ad. & El. 307; *Den ex dem. Howell v. Ashmore*, 22 N. J. L. 261, 265; *Shields v. Lozear*, 34 N. J. L. 496, 500, 3 Am. Rep. 256; *Hilbourn v. Fogg*, 99 Mass. 11; *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498.

Note: The foundation of the estoppel is the occupation of the premises by the permission of the landlord. It operates even after

the expiration of a lease and until possession is ended. The possession alone does not create an estoppel, but there must also be an acknowledgment of the title of the landlord. This is the effect of going into possession under a lease. *Shew v. Call*, 119 N. C. 450; 26 S. E. 33; 56 Am. St. Rep. 678. *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

The tenant will be relieved of the estoppel by surrendering possession to the landlord: *Smith v. Mundy*, 18 Ala. 182; 52 Am. Dec. 221.

SEC. 7. TERMINATION OF ESTATE.

SMITH v. McENANY.

170 Mass. 26; 64 Am. St. Rep. 272; 48 N. E. 781. (1897)

HOLMES, J. This is an action upon a lease for rent, and for breach of a covenant to repair. There is also a count on an account annexed, for use and occupation, etc., but nothing turns on it. The defense is an eviction. The land is a lot in the city of Boston, the part concerned being covered by a shed which was used by the defendant to store wagons. The eviction relied on was the building of a permanent brick wall for a building on adjoining land belonging to the plaintiff's husband, which encroached nine inches by the plaintiff's admission, or, as his witness testified from measurements, thirteen and a half inches, or, as the defendant said, two feet, for thirty-four feet along the back of the shed. The wall was built with the plaintiff's assent, and with knowledge that it encroached, on the demised premises. The judge ruled that the defendant had a right to treat this as an eviction determining the lease. The plaintiff asked to have the ruling so qualified as to make the question depend upon whether the wall made the premises "uninhabitable for the purpose for which they were hired, materially changing the character and beneficial enjoyment thereof." This was refused, and the plaintiff excepted. The bill of exceptions is unnecessarily complicated by the insertion of evidence of waiver and other matters; but the only question before us is the one stated, and we have stated all the facts which are necessary for its decision.

The refusal was right. It is settled in this state, in accordance

with the law of England, that a wrongful eviction of the tenant by the landlord from a part of the premises suspends the rent under the lease. The main reason which is given for the decision is, that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned: *Shumway v. Collins*, 6 Gray, 227, 232; *Leishman v. White*, 1 Allen, 489; *Royce v. Guggenheim*, 106 Mass. 201, 202; 8 Am. Rep. 322; *Smith v. Raleigh*, 3 Camp. 513; *Watson v. Waud*, 8 Ex. 335, 339. It also is said that the landlord shall not apportion his own wrong, following an expression in some of the older English books: *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Colburn v. Morrill*, 117 Mass. 262; 19 Am. Rep. 415; *Mirick v. Hoppin*, 118 Mass. 582 587. But this does not so much explain the rule as suggest the limitation that there may be an apportionment when the eviction is by title paramount, or when the lessor's entry is rightful: *Fillebrown v. Hoar*, 124 Mass. 580, 583; *Neale v. Mackenzie*, 1 Mees. & W. 747, 758; *Christopher v. Austin*, 11 N. Y. 216, 218; *Hodgkins v. Robson*, 1 Vent. 276. *Hodgkins v. Thornborough*, Pol. 141; 3 Keb. 557; *Coke on Littleton*, 148b; *Gilbert on Rents*, 151 *et seq.* It leaves open the question why the landlord may not show that his wrong extended only to a part of the premises. No doubt the question equally may be asked why the lease is construed to exclude apportionment, and it may be that this is partly due to the traditional doctrine that the rent issues out of the land, and that the whole rent is charged on every part of the land. *Gilbert on Rents*, 178, 179, gives this as one ground why the lessor shall not discharge any part from the burden and continue to charge the rest, coupled with considerations partly of a feudal nature: See, also, *Walker's case*, 3 Coke, 22a, 22b; *Hodgkins v. Thornborough*, Pol. 141, 143; *Neale v. Mackenzie*, 1 Mees. & W. 747, 763. But the same view naturally would be taken if the question arose now for the first time. The land is hired as one whole. If by his own fault the landlord withdraws a part of it, he cannot recover either on the lease or outside of it for the occupation of the residue: *Leishman v. White*, 1 Allen, 489. See *Fuller v. Ruby*, 10 Gray, 285, 289; *Keener on Quasi Contracts*, 215.

It follows from the nature of the reason for the decisions which we have stated that when the tenant proves a wrongful forfeiture by the landlord from an appreciable part of the premises, no inquiry is open as to the greater or less importance of the parcel from which the tenant is forfeited. Outside the rule *de minimis*, the degree of

interference with the use and enjoyment of the premises is important only in the case of acts not physically excluding the tenant, but alleged to have an equally serious practical effect, just as the intent is important only in the case of acts not necessarily amounting to an entry and forfeiture of the tenant: *Skally v. Shute*, 132 Mass. 367. The inquiry is for the purpose of settling whether the landlord's acts had the alleged effect; that is, whether the tenant is evicted from any portion of the land. If that is admitted, the rent is suspended, because, by the terms of the instrument as construed, the tenant has made it an absolute condition that he should have the whole of the demised premises, at least as against willful interference on the landlord's part. A case somewhat like the present is *Upton v. Townsend*, 17 Com. B. 30, 74. See, also, *Sherman v. Williams*, 113 Mass. 481, 485; 18 Am. Rep. 522.

We must repeat that we do not understand any question except the one which we have dealt with to be before us. An eviction like the present does not necessarily end the lease: *Leishman v. White*, 1 Allen, 489, 490; or other obligations of the tenant under it, such as the covenant to repair: *Carrel v. Read*, Cro. Eliz. 374; *Snelling v. Stagg*, Bull. N. P. 165; *Morrison v. Chadwick*, 7 Com. B. 266; *Newton v. Allin*, 1 Q. B. 518.

Exceptions overruled.

Note: In 38 Am. St. Rep. 476, there is an extensive note on the subject: What Justifies a Tenant in Abandoning Leased Premises.

SEC. 8. DESTRUCTION OF PREMISES.

WOMACK v. McQUARRY.

28 Indiana 103; 92 Am. Dec. 306. (1867)

FRAZER, J. The appellant sued the appellee to recover rents. The facts were, that the appellant, on the 7th of March, 1864, owned a saw-mill and a woolen factory. The two buildings were separate, but side by side. The machinery of both was propelled by water drawn from the pool of one dam, but each had its separate fore-bay and water-wheel. On that day the saw-mill and one room of the factory building (for a carpenter-shop), which had an entrance from

the saw-mill, were leased to the appellee for three years, the appellee agreeing to pay quarterly therefor the sum of three hundred dollars per annum. The appellee took possession of the leased property on the day of the contract; and while in possession, on the 9th of June following, both buildings with their contents, except the water-wheels, basements, and such parts as were protected by the water, were consumed by a fire originating in the carpenter-shop. In December following, Green & Co., real estate agents, caused an advertisement to be published in a newspaper offering the property for sale. Green & Co., were authorized by the appellant to sell the property, only subject to the appellee's lease, and the appellant had no part in framing or publishing the advertisement. The property, however, was not sold. After the conflagration neither party exercised any manual control of the property leased.

The question presented is, whether, under the circumstances, the plaintiff can recover rent for the premises after the destruction of the buildings by fire. The general doctrine that, in the absence of a contract to rebuild, a tenant agreeing expressly to pay rent is not relieved of that obligation by the accidental destruction of the building leased, unless it is so provided in the contract, is so well established and understood that it is needless to refer to the authorities supporting it. There are, however, some comparatively recent cases in which an exception to this rule has been held to exist: *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. 315; *Stockwell v. Hunter*, 11 Met. 448 (45 Am. Dec. 220); *Graves v. Berdan*, 26 N. Y. 498. This exception applies only to cases where the demise is of part of an entire building, as a cellar or upper room; and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and that when that enjoyment becomes impossible by reason of the destruction of the building, there remains nothing upon which the demise can operate. The leading one of those cases, *Winton v. Cornish*, *supra*, presented strong reasons of justice and policy for the ruling; the lessee of a lower room, cellar, or part of a building of several stories, in that case, interposing to prevent the erection of a new structure by the landlord. Had he succeeded, a valuable lot in Cincinnati must, in consideration of a yearly rental, probably bearing no reasonable proportion to its value, have remained for over two years unimproved. That no such consequence could have been intended by the parties, it is not easy to controvert. We are

satisfied to follow the doctrine of these cases. It is, in the case before us, applicable to the carpenter-shop, but not to the saw-mill. It results that the lessee must pay rent for the latter. As the contract was entire, there must be an abatement of the rent on account of the destruction of the factory. Justice can only be done in the case by apportioning the rent, as in cases where a part of the premises is lost to the tenant by the act of God, or he is evicted of part by title paramount: Taylor's Landlord and Tenant, secs. 385, 386.

The judgment is reversed, with costs, and the cause remanded for a new trial.

WARREN v. WAGNER.

75 Ala. 188; 51 Am. Rep. 446. (1883)

BRICKELL, C. J. * * * The representation of the husband, pending the negotiations for the lease, and prior to its execution, seems to have been limited to the legal effect and operation of a particular clause or covenant, and not to the lease taken in its entirety. The clause or covenant to which the representation related was that by which the lessee stipulates that he would "deliver up the said leased premises, with all the machinery and other things mentioned in the schedule hereunto attached, to the said Mary B. Wagner, her heirs or assigns, and quietly, at the expiration of the said term of three years, in as good order and condition as the same now are, reasonable use and wear and tear excepted." The representation was, that this clause or covenant did not impose a liability upon the lessee to repair or to restore, if there was by fire, or other unavoidable accident, a destruction of the premises, or a material part thereof, during the term. If the representation was (as we are now bound to regard it) confined to the legal effect of this particular clause, and was without reference to the lease in its entirety, it was not untrue. In all leases it is implied, if it be not expressed, that the lessee will pay the rent as it accrues, will make tenantable repairs, will avoid the exposure of the premises to ruin or destruction by acts of omission or commission, and on the expiration of the term, will quietly surrender possession. In the absence of an express covenant, he is not amenable because of the deterioration of the premises from the ordinary wear and tear incident to their reasonable use;

nor if by unavoidable accident, or by the act of God, or by the act of a public enemy, there is injury to, or a destruction of the premises, is he bound to repair or restore. *Taylor Land. and Ten.* 343; *Nave v. Berry*, 22 Ala. 382; *U. S. v. Bostwick*, 94 U. S. 53; *Warner v. Hitchins*, 5 Barb. 666. A covenant on the part of the lessee, like that we are now considering, that upon the expiration of the term, he will return or surrender possession of the premises in the same condition they were when he entered into possession, the usual or natural wear and tear excepted, is not a covenant to repair or rebuild; it is but the expression of the implied obligation or duty resting upon him. Authorities *supra*; *Maggort v. Hansburger*, 8 Leigh, 532; *Howeth v. Anderson*, 25 Tex. 557. In this view, there was no misrepresentation, and the evidence was irrelevant. It is the settled practice to entertain a motion for the exclusion of evidence, which is not merely secondary, but in itself illegal, or irrelevant, at any stage of the cause before the retirement of the jury. 1 *Brick. Dig.* p. 887, 1190, 1197. Whether the lease taken in its entirety contains any covenant binding the lessee to rebuild or restore, if there was injury to, or destruction of the premises, without fault or neglect on his part, is not a question now presented. If such obligation is imposed, and as is most probable, the representation of the husband had reference to the lease in its entirety, whether it was the expression of an opinion upon matter of law, as distinguished from the representation of matter of fact; and if it be the representation of matter of law, whether it was not fraudulent, as proceeding from a party having superior means of information, professing a superior knowledge of the law, upon which the lessee relied, in ignorance and in confidence, trusting to the truthfulness of the husband, and thereby enabling the lessor to gain an unconscionable advantage, are not inquiries now involved. Nor do we see that they can arise in this cause, or unless there should be an effort to enforce the clause or covenant of the lease, which imposes the obligation. There is no possible aspect of the case in which the evidence was not irrelevant, and it was properly excluded.

A lessee of premises destroyed during the term by unavoidable accident is not excused from the performance of an express provision or covenant to pay rent for the term, unless he has protected himself by an express stipulation for the cessation of rent in that event, or the landlord has covenanted to repair or rebuild. 3 *Kent Com.* 603; *Taylor Land. and Ten.*, 372-75, 377; *Chamberlain v. Godfrey*, 50 Ala. 530. A limitation, or rather an exception to the general rule,

which seems to obtain, and has been specially applied to leases of apartments in a tenement, or to leases of tenements for particular uses, is that the destruction must not be of the entire subject-matter of the lease; there must be remaining something capable of holding and enjoyment by the lessee. The value of the premises may be diminished; they may be rendered incapable of yielding the benefit it was expected to realize from their use and occupation. So long as the thing is capable of holding under the lease, the obligation and duty of paying the rent continue. *Chamberlain v. Godfrey*, *supra*; *McMillan v. Solomon*, 42 Ala. 356. Whether this limitation or exception to the general rule, holding a lessee to liability upon his express and unconditional promise or covenant to pay rent, is not as it has been usually applied, confined to a lease of tenements for particular purposes, or to the apartments of a tenement, and cannot be extended to a lease of lands and tenements, is not now of importance. This lease is of lands and tenements, accompanied with the right of quarrying stone upon the lands during the term. The only injury or destruction upon the premises was of the lime-kiln, the use of which, it may be, was the principal consideration moving the lessee to enter into the lease, and it was probably the thing from which it was expected the principal profit would issue. The lands and the tenements remain, capable of use and enjoyment, and the right of quarrying stone continues. It would be a latitudinous construction of the exception, not warranted by authority, that would draw this case within its influence. There is no error in the several rulings of the Circuit Court upon this point.

The eviction of a tenant consists in the disturbance of his possession, his expulsion or a motion depriving him of the enjoyment of the premises demised, or any portion thereof, by title paramount, or by the entry and act of the landlord. The eviction may operate a bar, partially or wholly, to the right to demand rent falling due in the future. *Taylor Land. and Ten.*, 378-88. If it be from a part only of the premises, by title paramount, the rent is discharged partially, in proportion to the value of the premises of which the tenant is dispossessed. But if the eviction is the act of the landlord, the entire rent is suspended during its continuance, for the reason that a man cannot apportion his own wrong, and the landlord shall not so apportion his tortious act and entry, as to compel the tenant to pay rent for the part of the premises upon which he does not enter. *Royce v. Guggenheim*, 106 Mass. 201; s. c., 8 Am. Rep. 322; *De Witt v. Pierson*, 112 Mass. 8; s. c., 17 Am. Rep. 58, note; *Crommelin v.*

Thiess, 31 Ala. 412; *Chamberlain v. Godfrey*, 50 Ala. 530. A mere trespass by the landlord upon the premises, not intended by him as a permanent amotion or expulsion of the tenant, or to deprive him of the possession and enjoyment of the premises, may entitle the tenant to recover damages, but it will not amount to an eviction. *Taylor Land. and Ten.*, 380; *Lounsbury v. Snyder*, 31 N. Y. 514; *Edgerton v. Page*, 20 N. Y. 281; *Lynch v. Baldwin*, 69 Ill. 210. If the damages are capable of legal measurement by a pecuniary standard, as if they consist only of the value of use and occupation during the continuance of the trespass, they would form proper matter of set-off to an action by the landlord for the recovery of rent. *Cage v. Phillips*, 38 Ala. 382; *Holley v. Younge*, 27 Ala. 203; *Kannady v. Lambert*, 37 Ala. 57. Or if the damages are unliquidated, and not capable of legal measurement by a pecuniary standard, they will form matter for recoupment in an action by the landlord for the recovery of rent. *Lynch v. Baldwin*, *supra*; *Batterman v. Pierce*, 3 Hill, 171. The eviction, or the trespass, may be the act of the landlord in person, or it may be the act of a servant or agent, for which he is answerable upon the general doctrine holding a principal liable for the misfeasance or torts of a servant or agent. *Story Agency*, 452. Direct or positive evidence that the wrongful act, whether it be of eviction or of trespass, was done under the authority, or by the consent of the landlord, is not necessary. Such evidence is not often attainable, and the fact, like any other controverted fact, is capable of proof by circumstances. The nature and character of the act, taken in connection with the relation of the landlord to the actor; his employment or agency in the business of the landlord; and the acquiescence of the latter in former acts, accompanied by circumstances indicative of his knowledge that the act was done, or continued, and the absence of objection upon his part, are facts which must be considered by the jury, whose business it is to determine the inquiry, whether he authorized or assented to the act complained of as wrongful. *McClung v. Spotswood*, 19 Ala. 165; *Krebs v. O'Grady*, 23 Ala. 726; s. c., 58 Am. Dec. 312; *Gimon v. Terrell*, 38 Ala. 208. * * *

CHAPTER VII.

TENANCIES AT WILL, FROM YEAR TO YEAR AND AT SUFFERANCE.

- Section 1. Tenancy At Will.
- Section 2. Tenancy from Year to Year.
- Section 3. Tenancy at Sufferance.
- Section 4. Landlord's Option as to Tenant's Holding Over.

SEC. 1. TENANCY AT WILL.

RICH v. BOLTON.

46 Vt. 84; 14 Am. Rep. 616. (1873)

* * * Action to recover possession of premises. Plaintiff's evidence tended to show that the premises in question had belonged to her for twenty-five or thirty years; that in April, 1857, defendant went into possession thereof, with her consent, without any bargain as to the time he was to remain or the price of rent; that the first year defendant built a small barn on the premises and repaired the house; that plaintiff could get nothing out of defendant for rent; that she tried to settle with him two or three years before the suit, but could get nothing but the repairs. Plaintiff gave defendant notice to quit on the 27th of May, 1871, and commenced this action June 14, following. The court, at the trial, held that the tenancy was from year to year, and that defendant was entitled to six months' notice to quit, and rendered judgment of nonsuit. Plaintiff excepted.

REDFIELD, J. Did the occupancy of the premises by the defendant create such a relation to the plaintiff, that he is entitled, before suit, to six months' notice to quit? The defendant went into possession with the plaintiff's consent, but with no agreement as to paying rent. He built a barn on the premises, and repaired the house. The plaintiff testified that she tried to settle with him, but could get nothing of him but the repairs. From this statement it would seem that he declined and refused to settle and pay rent. After such refusal,

he could not claim that, by his continued occupancy, his estate had become enlarged by reason of an implied liability to pay reasonable annual rent. These repairs, if made in compensation for the use, were not a payment of a yearly rent, but rather payments in gross, for the whole occupancy.

In *Roe ex. d. v. Lees*, 2 W. Bl. 1173, DeGrey, Ch. J., said that "leases for uncertain terms are, *prima facie*, leases at will; it is the reservation of annual rent that turns them into leases from year to year." In *Richardson v. Taugridge*, 4 Taunt. 128, it was held that the letting of a shed to be used as a stable, for the dung for compensation, created a tenancy at will, and not from year to year, because there was no reservation of rent referable to a year, or any aliquot part of a year. In *Jackson ex. d. v. Bradt*, 2 Caines, 169, Kent, J., said: "The reservation of annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year." The same learned jurist stated the rule, in nearly the same language in *Jackson ex. d. v. Rogers*, Caines' Cases in Error, 314, and in his commentaries, 4 Kent's Com. 113. In 1 Washb. Real Prop. 382, it is stated that "an agreement to pay rent, on the part of the tenant, is regarded as an essential element of a tenancy from year to year, and the time at which it is payable must have reference to a yearly holding, such as by the year, or some aliquot part of a year." This element of annual rent will be found in each case cited in behalf of the defendant. *Barlow v. Wainwright*, 22 Vt. 88; *Silsby v. Allen*, 43 id. 172. In *Doe d. Price v. Price*, 9 Bing. 356, the defendant had been let into possession without special agreement as to rent, and had plaintiff required him to settled and pay what he owed him, or quit the premises. It was held, Tindal, Ch. J., giving the opinion, a tenancy at will, and that the notice determined the will. See cases cited in *Chamberlain v. Donehue*, 45 Vt. 50.

This case has none of the distinctive features of a tenancy from year to year, except the long acquiescence in the defendant's occupancy. We think in directing a verdict for the defendant for the want of six months' notice to quit, there was error. There are several reported cases which maintain that a tenant at will even, is entitled to six months' notice to quit. *Parker v. Constable*, 3 Wils. 25; *Jackson v. Bryan*, 1 Johns, 322; *Jackson v. Laughhead*, 2 id. 75; *Jackson v. Wheeler*, 6 id. 271; *Putnam, J.*, upon *Ellis v. Page*, 1 Pick. 43, reported 2 id. 71, note. The learned judge, in the latter case, states the proposition, that the occupant for an indefinite time, with the consent of the owner, is entitled to six months' notice to

quit, and cites many authorities.' Of these cases, those from Keilw. 65; Brooke's Abr. 53; Viner's Abr. Est. B. 3; Com. Dig. Estates, x 9; and Layton v. Field, 3 Salk. 222, were each determinations in regard to well-defined tenancies from year to year. Those from Keilw. 162; Year Books, 35 x. 6, 24, 1348; 14 & 16 x. 8, 13; and from 10 Vin. Abr. 406, were upon the question of the right of the tenant to the emblements. Right v. Darby, 1 T. R. 159; Shore v. Porter, 3 id. 13; Regge v. Bell, 5 id. 471; Martin v. Watts, 7 id. 83; Timmins v. Rowllison, 3 Burr. 1603, and Rising v. Stannard, 17 Mass. 282, will be found on examination to be, all of them, cases where annual rent was reserved. And most of the cases as well as the case in which Putnam, J., gave the opinion, *supra*, arose under the Statute of Frauds, which declared certain parol leases to be, in effect, leases at will only. And the courts were called upon to determine whether the rights (notice to quit, among others) which tenants under the common law had acquired, by occupation and payment of rent, were taken away by the statute.

And what is said in most of these cases, in respect to tenancies at will, is with reference to tenancies declared to be such by the statute, but which had grown into tenancies from year to year, by occupation and paying rent. In these cases the courts felt constrained to protect tenants from violence and wrong, by allowing the equitable right of notice to quit, in cases, notwithstanding the statute, where, in favor of tenants, such right had become engrafted at common law.

The English rule seems to be well established, that in tenancies at will, which are so in fact, and not in name merely, as declared by the statute, six months, notice to quit is not required. Right v. Beard, 13 East, 210; Knight v. Quigley, 2 Camp. 505; Hollingsworth v. Stennett, 2 Esp. 717; 1 Washb. Real Prop. 349. But in all cases of this kind there must be such notice as determines the will of the landlord, and a reasonable notice; and where emblements are in question, such notice as shall protect the tenant in his rights. 1 Smith's Lead. Cas. 76. No question of the right of the tenant to emblements arises in this case; and, as the case is presented, the defendant seems to have had all the notice that he was entitled to. Chamberlain v. Donehue, *supra*.

The right of the tenant, occupying by the consent of the owner, to gather what he had sown, as implied by such consent, was thoroughly engrafted into the common law of England; and when the Statute of Frauds declared certain parol leases, tenancies at will,

the courts wisely maintained the common law right of the tenant to reasonable notice, and where parol leases had become essentially tenancies from year to year, to six months' notice to quit. But this right was maintained by the courts, as a shield to the tenant, and not a sword therewith to defy the just rights of the landlord to claim his own.

Judgment reversed, and cause remanded.

TALAMO v. SPITZMILLER.

120 N. Y. 37; 17 Am. St. Rep. 607; 23 N. E. 980; 8 L. R. A. 221.
(1890)

BRADLEY, J. The action was brought to recover the proceeds of the sale made by the defendant of the plaintiff's goods. The defendant admits his liability to account to the plaintiff for the proceeds of such sale, and alleges several matters by way of counterclaim, which will be referred to so far as is essential to the determination of the questions presented for consideration of this review. The trial court found that on March 13, 1882, by an agreement of lease, in writing, under seal, made by Catherine Dickman and defendant, she leased to him a dwelling-house for the term of five years from May 1, 1882, at the annual rent of \$450 for the first year, and \$500 for each subsequent year, payable in monthly installments, in advance, which the defendant undertook to pay; that the defendant took such lease at the verbal instance and at the request of the plaintiff, and upon the unwritten understanding and agreement that they should jointly use and occupy the dwelling-house during the term mentioned in the lease, and that the plaintiff should pay to the defendant half the rent; that the defendant and plaintiff went into the possession of the house in May, 1882, and jointly occupied it until in November following, when the plaintiff quit the house, and has not since then occupied any portion of it; that the defendant has paid the monthly installments of rent as they fell due, and that plaintiff has paid nothing to the defendant on account of the rent. The court allowed to the defendant, against the plaintiff, a sum equal to one-half the rent for the period of the joint occupancy, six and a half months.

And upon exception to the conclusion of the court, that the plain-

tiff was entitled to recover the amount for which judgment was directed, arises the question whether the defendant was entitled to the allowance of a greater amount against the plaintiff than that given by the court on account of the rent. The contention of the defendant's counsel is: 1. That the plaintiff became liable to pay the defendant one-half the rent, which the latter undertook, by the lease, to pay as the installments should become due: 2. That if not so, the plaintiff became a yearly tenant, and was liable to the defendant for one-half the amount of the rent for one year.

The plaintiff, not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year not in writing was void: 2 R. S. p. 135, secs. 6, 8. The agreement between the parties, and under which the plaintiff entered into joint occupancy with the defendant, being void, gave to the plaintiff no right, and imposed upon the defendant no obligation, to permit him to go into or remain in possession of any portion of the house; and unless he became a yearly tenant, his liability was for use and occupation for the time only which he occupied: *Thomas v. Nelson*, 69 N. Y. 118.

The mere fact that a person goes into possession under a lease void because for a longer term than one year does not create a yearly tenancy. If he remains in possession, with the consent of the landlord, for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year. And the terms of the lease void as to duration of term would control in respect to the rent: *Coudert v. Cohn*, 118 N. Y. 309; 16 Am. St. Rep. 761. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred,—something which tends to show that it is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent, is evidence of such understanding, and goes in support of a yearly tenancy; and without explanation to the contrary, it is controlling evidence for that purpose: *Cox v. Bent*, 5 Bing. 185; *Bishop v. Howard*, 2 Barn & C. 100; *Braythwayte v. Hitchcock*, 10 Mees. & W. 494; *Mann v. Love-*

joy, Ryan & M. 355; Thomas v. Packer, 1 Hurl. & N. 672; Doe v. Crago, 6 Conn. B. 90.

While there may appear to have been some confusion in the cases in this state upon the subject, this doctrine has been more recently recognized: Reeder v. Sayre, 70 N. Y. 184; 26 Am. Rep. 567; Laughran v. Smith, 75 N. Y. 209.

In the cases last cited, the tenants had been in possession more than a year when the question arose; but having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and when once created, could be terminated by neither party without the consent of the other, only at the end of the year. The contention, therefore, that, by force of the original agreement between the parties, aided by the fact that the plaintiff went into possession with the consent of the defendant, a tenancy from year to year was created, is not so, and this is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement, and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises which charged him with liability, other than for use and occupation during the time he remained in possession. The defendant's counsel, to support his proposition that the entry by the plaintiff, with the consent of the defendant, made him a yearly tenant, cites *Craske v. Christian U. P. Co.*, 17 Hun, 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year."

If that was intended by the learned justice as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in *Laughran v. Smith*, 75 N. Y. 209. That remark in the *Craske* case was not essential to the determination there made, as rent was in fact paid for a portion of the term, nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named, and that when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay, at the rate of the stipulated rent, as for use and occu-

pation: *Barlow v. Wainwright*, 22 Vt. 88; 52 Am. Dec. 79. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay, and a purpose manifested to accept, a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise of the plaintiff to pay one-half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years, and pay one-half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the defendant: 1 *Woodfall on Landlord and Tenant*, 1st Am. ed. from 13th Eng. ed., 221.

* * *

ESTY v. BAKER.

50 Maine 325; 79 Am. Dec. 619. (1862)

DAVIS, J. * * * The plaintiff contended, at the trial, that if the passage-way was not embraced in the deed from the Putnams, he had occupied it for a long time with their consent; that he was therefore a tenant at will; and that until the tenancy should be terminated by a notice to quit, according to the statute, the defendant, or his lessors, had no right of entry. But the jury were instructed "that if the plaintiff was the tenant at will of the Putnams, that tenancy was terminated by the sale to Hussey; that the alienation of the estate changed the tenancy at will to a tenancy at sufferance."

The plaintiff appears to have occupied with the consent of the subsequent owners, as much as of the Putnams, until the defendant took his lease for a term of years, in 1857. But the principle would apply to the last alienation as well as to the first. It is not claimed that the defendant ever gave such consent.

The statute in force at the time provided that "tenancies at will might be terminated by notice in writing served upon the occupant thirty days before the time fixed in said notice for the termination thereof." Law of 1853, c. 39, sec. 1.

This statute, and the one which preceded it, requiring a longer notice, enabled a landlord to terminate such a tenancy without entry therefor, or alienation. It does not provide that such tenancies cannot be terminated in any other way. And even if this is implied in tenancies at will under the statute, such tenancies at common law may be terminated in the same manner as before.

"If the landlord enters on the land and cuts down the trees demised, or makes a feoffment, or a lease for years to commence immediately, the estate at will is thereby determined." 1 Crui. Dig., tit. 9, c. 1, sec. 18. "It is an intrinsic quality of an estate at will," says Shaw, C. J., "that it is personal and cannot pass to an assignee; and that, by an alienation in fee or for years, the estate at will is *ipso facto* determined, and cannot subsist longer. This is a limitation of the estate which is incident to its very nature. When, therefore, it is determined by operation of law, it is determined by its own limitation, without notice:" Howard v. Merriam, 5 Cush. 563. And in Curtis v. Galvin, 1 Allen, 215, the same doctrine is stated by Bigelow, C. J. "The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit, given according to the requisitions of the statute:" McFarland v. Chase, 7 Gray, 462.

This might seem at first view to be in conflict with the case of Young v. Young, 36 Me. 133. But that decision, if correct, does not apply to the case at bar. The tenant in that case was in possession under a parol lease, at an agreed rent. Except by special provision of statute, it would have been a valid lease from year to year. It was a tenancy at will by statute. And it is expressly declared in the opinion of the court that tenancies at will by the common law might be determined without notice to quit.

If the plaintiff was a tenant at will, it was by the common law. He occupied merely by the consent of the owner, without paying or agreeing to pay any rent. By the conveyance of the premises to the defendant he became a tenant at sufferance: Benedict v. Morse, 10 Met. 223. Such a tenant cannot maintain trespass *quare clausum* for a peaceable entry.

Motions and exceptions overruled.

SEC. 2. TENANCY FROM YEAR TO YEAR.

RICH v. BOLTON, *Supra*, p. 141.

CLAYTON v. BLAKEY.

8 T. R. 3; 2 *Smith's Leading Cases* 179. (1798)

This was an action against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence that the defendant had held the premises for two or three years under a parol demise for twenty-one years from the day mentioned to which the notice to quit referred; and the Statute of Frauds directing that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at the trial, at the last assizes for Northumberland that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. Rooke, J., however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

LORD KENYON, C. J. The direction was right, for such a holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year.

Per Curiam.

Rule refused.

STEDMAN v. McINTOSH.

26 N. C. (4 Ired. Law) 291; 42 Am. Dec. 122. (1844)

Ejectment. The trial turned upon the construction to be given to the lease under which the defendant held, and executed by the lessor of the plaintiff, as follows: "I have this day agreed with Roderick McIntosh to let him occupy the house now in his occupancy on my lot, at the rate of fourteen dollars per annum, rent to commence on the twenty-sixth of October, 1841, he having settled with me for the rent up to that time. In case Mr. McIntosh should desire to remove the house before October, 1842, he is to pay me only for the time he occupies the house while on my lot, at the rate above named. I hereby acknowledge I put no claim to the house; all I contend for is the rent for the land. In witness," etc. Plaintiff showed that defendant was in possession of the premises; that in July, 1842, the lessor of the plaintiff had informed defendant that he wanted him to leave, and defendant had said he was anxious to get away. Defendant moved for a nonsuit, as the lease constituted a tenancy from year to year, and had not been terminated by proper notice. This motion was opposed by plaintiff; but the court having expressed itself as of opinion that the plaintiff had made out no case, the plaintiff suffered judgment of nonsuit to be entered, and appealed.

NASH, J. The only question presented in this case is as to the true construction of the contract between the parties. This paper was executed on the ninth of September, 1841, and the action was brought on the nineteenth of November, 1842, the plaintiff having given the defendant notice to quit in July preceding. On the trial of the cause in the Superior Court of Chatham, it was contended by the defendant, that this was a tenancy from year to year, and that the tenancy could not be put an end to by the lessor, without giving to the tenant six months' notice to quit; and his honor, who presided, being of this opinion, the plaintiff submitted to a nonsuit, and appealed to this court. In the opinion of his honor we think there was error. The true inquiry is, not as to the nature of the estate, or interest, which the defendant acquired in the premises, but whether, by the contract, the plaintiff could bring this action without a previous notice to quit. We think he could, or, if any notice was necessary, that which was given was sufficient. Anciently, where a man entered into land, with the consent of the owner, and no express time was limited

for its termination, it was, by the strict letter of the law, a tenancy at will, and either party might put an end to it at his pleasure. This tenancy was fraught with much mischief; and its operation was often oppressive and unjust to the tenant, for he might be turned out of possession before his crop was fit for harvesting, and though the law gave him the right to enter and carry off his crop when ripe, still it subjected him to great inconvenience. It was also contrary to the policy of the state, which is in nothing more concerned than in protecting and cherishing the proper cultivation of the soil. Courts of justice, therefore, early viewed with strictness an estate fraught with so much injury to the interests of agriculture. Lord Kenyon, in the case of *Doe ex dem. Martin v. Watts*, 7 T. R. 83, says, "as long ago as the time of the year books, it was held, that a general occupation was an occupation from year to year, and the tenant could not be turned out without reasonable notice." It is now considered as settled law, that wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it, unless by a regular notice: *Legg v. Strudwich*, 2 Salk. 414; *Timmins v. Rowlinson*, Burr. 1609; *Doe ex dem. Martin v. Watts*, 7 T. R. 83. And it is also settled, that this notice must be given six months before and ending with the period at which the tenancy commenced: *Doe ex dem. Shore v. Porter*, 3 T. R. 13.

The courts, therefore, lean against construing leases to be at will, and in favor of their being from year to year; and so strongly has that disposition been felt, that it has been decided, in a court of very high authority, that, at this day, a tenancy at will can not be created: *Phillips v. Covert*, 7 Johns. 3. This, however, is carrying the doctrine too far. Both in England and in this state it has been held, and is now settled, that an estate at will, strictly so speaking, can be created: *Ball v. Cullimore*, 5 Tyrw. 753; and so by express contract between the parties: *Richardson v. Langridge*, 4 Taunt. 148; *Humphries v. Humphries*, 3 Ired. L. 363. In this last case it was ruled, that, though from policy every occupation of land is, *prima facie*, deemed a tenancy, from year to year, yet the owner may show, that it is only a tenancy at will, or any other tenancy, determinable at a particular time or on a particular event, by the express agreement of the parties. In other words, that the contract between the parties must govern and ascertain their respective rights. In this case, the contract sets forth, that the tenancy was to commence on the twenty-sixth of October, 1841, at the yearly rent of fourteen

dollars for one year, and at that rate for any shorter time; it then stipulates, in case Mr. McIntosh shall desire to move the house before October, 1842, he is to pay only for the time he occupies the house or the lot at the rate of fourteen dollars for one year. We think these stipulations clearly fix a terminus for the lease, to wit, the twenty-sixth of October, 1842. There are several ways, by which the relation of landlord and tenant may terminate, without any notice to quit: as where, by the agreement of the parties, notice is waived, or, when its determination is made to depend upon some particular event, as the death of a particular individual; here the death of the individual is in itself a termination of the lease, and the estate of the lessee ceases. So, where its determination is fixed by the effluxion of time, as where it is to terminate at a particular period. In neither of these cases is any notice to quit necessary, and the lessor may, upon the expiration of the time specified, or the happening of the particular event, immediately enter upon the lessee: *Cobb v. Stokes*, 8 East, 358; *Messenger v. Armstrong*, 1 T. R. 54. On behalf of the plaintiff it was urged, that this was a tenancy at will, because, by the terms of the contract, the defendant had a right to put an end to it at his pleasure—and that the law gave the lessor of the plaintiff the same right, which he had exercised by giving the defendant two months' notice to quit. Whether this was a tenancy at will, or one whose termination was by the contract fixed and determined; we are of opinion it was not a tenancy from year to year, and that, in either case, the opinion of his honor was erroneous. The plaintiff was entitled to maintain his action, as he did not commence it before the twenty-sixth of October, 1842, one year from the commencement of his lease.

Judgment reversed and venire *de novo* awarded.

SEC. 3. TENANCY AT SUFFERANCE.

Coke Litt. 57b.

There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entred by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate endeth continueth in possession and wrongfully holdeth over.

RUSSELL v. FABYAN.

34 N. H. 218. (1856)

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseisor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bla. Com. 150; 4 Kent Com. 116; *Livingston v. Tanner*, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. *Conway v. Starkweather*, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseisor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22nd of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same grounds as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseisor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong. *Delaney v. Ga Nun*, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire it becomes material to inquire what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he retains the possession as a wrongdoer, just as a disseisor acquires and retains his possession by wrong. *Den v. Adams*, 7 Hals. 99; 2 Bla. Com. 150; 4 Kent Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Ab. 416; *Estate D*, C. 2.

If no such assent appears, the tenant is entitled to no notice to quit. *Jackson v. McLeod*, 12 Barb. 483; 12 Johns. 182; 1 Cru. Dig. tit. 9, 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. *Livingston v. Tanner*, 12 Barb. 483; *Den v. Adams*, 7 Hals. 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as was held in *Preston v. Love*, Noy, 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseisor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance until he has entered upon the premises; 4 Kent Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseisor and unqualified wrongdoer.

By Stat. 6 Anne, chap. 31, made perpetual 10 Anne, chap. 14 (1708, 1712), no action or process whatever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, n. 377; 3 Bla. Com. 228, n.; 1 Com. Dig. 209, Action for Negligence, A. 6. It is not necessary to consider whether this statute has been adopted here, though

it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseisor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseisor is liable for any damages occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseisor. * * *

SEC. 4. LANDLORD'S OPTION AS TO TENANT HOLDING OVER.

HAYNES v. ALDRICH.

133 N. Y. 287; 31 N. E. 94; 28 Am. St. Rep. 636. (1892)

FINCH, J. Judgment was ordered against the defendant upon the trial of this action for rent accrued after the expiration of her original lease, upon the ground that by holding over after such expiration, she became a tenant for another year upon the terms of the prior written lease. The facts disclosed were that such lease ended by its terms on May 1, 1889; that it contained a provision that the premises should be occupied as a private dwelling, and a covenant not to sublet without the written consent of the lessor. Both stipulations were violated. The tenant, without permission, rented the premises to Mrs. Coventry, who occupied them as a boarding house, and received as one of her boarders a lady, who was a chronic invalid, and continuously ill. On the 4th of February, 1889, the lessor inquired of the lessee whether she desired to renew her lease for another year, and was informed that she did not. The 1st day of May was a holiday, and possibly the tenant had until noon of the next day for a surrender of possession. But the possession was retained by the tenant until the afternoon of May 4th, when the keys were tendered, but refused. The excuse given is that on the 2d day of May there was difficulty in engaging trucks, that the removal began on the 3d, but the sick boarder could not then be moved with safety, and was not moved until the 4th. This court held in *Commissioners v. Clark*, 33 N. Y. 251, that the rule is too well settled to be disputed

that, where a tenant holds over after the expiration of his term, the law will imply an agreement, to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord, and not with the tenant; and that the latter holds over his term at his peril. In *Conway v. Starkweather*, 1 Denio, 114, the tenant had notified the landlord of his intention not to remain for another year, as was the fact in the present case, but nevertheless did hold over for a fortnight, and the fact of the notice was held to be immaterial, the court saying: "The act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant, and it is not in his power to throw off that character, however onerous it may be." The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily, and for his own convenience, that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury; and no lessor would ever know when he could safely promise possession to a new tenant. The cases cited by the appellant do not bear out his contention. In *Smith v. Allt*, 7 Daly, 492, the holding over was in part the act and assent of the landlord, and occasioned by pending negotiations, and could not have been said to be the sole act of the tenant. In *Shanahan v. Shanahan*, 55 N. Y. Super. Ct. 344, it appeared that the 1st of May was Sunday; that the tenant began to move on the afternoon of the 2d; that the removal continued during the 3d; and for that reason the tenant was held liable. The court did interject the remark that there was no unavoidable delay in moving, but without seeking to change or modify the rule. In *McCabe v. Evers*, 9 N. Y. Supp. 541, decided in 1890, in the New York city court, it appeared that the tenant moved out on the 1st of May, but left behind him an old stove and some rubbish, and tendered the key on the 2d of May. The court held that the evidence of a holding over was inconclusive and ambiguous, and the question should have been submitted to the jury. In *Manly v. Clemmens*, 14 N. Y. Supp. 366, decided by the same court, the term expired on February 2d at noon; the tenant began his removal in the morning, and worked till midnight. There was a verdict against the landlord, which the court refused to set aside. These cases, even

if regarded in all respects as correctly decided, fall very far short of establishing the appellant's doctrine, or justifying a reversal in the present case. There is no question here about the fact of a holding over, and no question, therefore, in that regard, for the solution of a jury. The tenant remained in possession voluntarily, for her own convenience and that of her sick boarder. If it was unsafe to remove the latter, the situation was wholly the fault of the tenant, who sets up as an excuse for one violation of the lessor's rights the consequences of her own earlier violation of the terms of the lease. No impossibility of removal was shown; merely difficulty and inconvenience, which should have been and might have been foreseen and provided against. If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine, and tend to involve the rights of both lessor and lessee in uncertainty and confusion. I do not mean to say that whether there has been a holding over at all may not sometimes be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question, also, whether there might not be an unavoidable delay in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act.

It is claimed, however, that the further question whether the lessor exercised the permitted option or took possession in her own right should have been submitted to the jury. I think the facts admit of but one inference. The lessor did exercise her option, and that promptly and clearly. When the keys were tendered to her mother they were refused. In the afternoon of May 4th the lessor went to the house, to see what was occurring. She found it deserted, and the windows open. Her property needed protection. Under the lease she had a right to enter and relet it as the agent of the tenant. A policeman entered through the open window. Some keys were found on the mantel, and thereafter used, but evidently not all, for others were restored much later. The premises were somewhat damaged, and the lessor had a little painting and some plumbing done, amounting only to ordinary and needed repairs. She tried to rent the house, but failed, and went to Europe during the summer, and occupied the house in the fall, under a stipulation which expressly reserved

her existing rights. Upon these facts no inference was justified except that drawn by the court. There was a clear refusal to accept the surrender offered, and the repairs were consistent with that position, and with the right reserved in the lease. We think the judgment was correct, and should be affirmed, with costs. All concur.

HOLLIS v. BURNS.

100 Penn. St. 206; 45 Am. Rep. 379. (1882)

MERCUR, J. The plaintiff declared in assumpsit on an implied contract for use and occupation of a certain dwelling-house. The defendant had rented the house and occupied it for twenty months. Then she withdrew therefrom, notified the plaintiff, paid the rent up to that time, and tendered the key, which the plaintiff retained in such a manner as not to release her from liability for the unexpired portion of the year in case she was legally chargeable therefor.

The plaintiff claims she was a tenant from year to year, and seeks to recover rent for four months after she left the house. The defendant alleges she rented by the month and was not liable beyond the months of her occupancy. The letting was by parol and the evidence as to its terms was conflicting. The learned judge charged the jury "if it was a letting for fifty dollars per month, without anything being said about a year, then the plaintiff cannot recover the amount here claimed."

The only specification of error is to this charge. The plaintiff claims whether the original lease was by the year or by the month, inasmuch as the defendant held over beyond a year, she can be required to pay for the whole of the second year, although she did not occupy the premises during any part of the last four months. Had the lease been by the year the tenant might be so liable. *Diller v. Roberts*, 13 S. & R. 60; 15 Am. Dec. 578; *Phillips v. Monges*, 4 Whart, 226; *Hemphill v. Flynn*, 2 Barr. 144. All these were cases where the letting was by the year. They recognize a sound principle. When a landlord has let specific property by the year it would be manifestly unjust to compel him, against his will, to assent to a renewal for such shorter term as the will or caprice of his tenant might dictate.

If the lessee enters as a tenant by the year, and holds over it is

optional with the landlord, either to treat him as a tenant from year to year, or as a trespasser. *Hemphill v. Flynn, supra*.

It is true for some purposes the lessee for any certain time less than a year is recognized as a tenant for years. 2 Bl. Com. 140; *Shaffer v. Sutton*, 5 Binn. 228.

When however we are dealing with the question of an implied renewal of a tenancy, all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different; but to continue the former so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes a continuation of its characteristic features. Hence if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy by the month it will presumptively so continue. The landlord cannot impose a longer term; nor one radically different from the former.

In the case a tenant by the month holds over, it will not be claimed that he is entitled to three months' notice to quit. If the tenancy be by the month, a month's notice to quit is sufficient. *Taylor Land. & Ten.* 57.

The jury has found the letting was by the month only. The tenant then had a right to leave when he did, and was not legally chargeable for use and occupation thereafter.

Judgment affirmed.

HERTER v. MULLEN.

159 N. Y. 28; 70 Am. St. Rep. 517; 53 N. E. 700; 44 L. R. A. 703.
(1899)

O'BRIEN, J. * * * There can be no doubt that the rule of law is settled beyond debate or controversy which permits the landlord, at his election, to treat the tenant as holding for another year when the latter remains in possession after the expiration of the term. When the demise is for a definite term of one year at a fixed rent and the tenant holds over after that term expires, the landlord may treat him as a tenant for another year and collect rent accordingly: *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636; *Adams v. Cohoes*, 127 N. Y. 182. But the question is whether the tenant did in fact hold over after the expiration of the term, within the meaning

of that rule. If it is an arbitrary one, applicable under all circumstances and conditions, and to be enforced in every case without regard to the reason upon which it is founded, it may be said that in a strict sense there was a holding over in this case. But this rule that obtains in the relation of landlord and tenant is a part of the common law, the chief merit of which is supposed to consist in its adaptability to changing circumstances and new conditions as developed in the progress of time. It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress. From the facts disclosed by the answer in this case the tenant vacated the house at the expiration of the term, except one bedroom in which a member of his family was confined by illness so serious that he was warned by the physician that any attempt to remove her would imperil her life. The decision of the learned trial court in the case virtually holds that on the last day of the tenant's term he was placed in a position where he must either pay rent for another year for a house that he did not intend to occupy, or to take the risk of becoming, in a certain sense, responsible for the death of his mother by attempting to remove her from a sickroom against the protest of a physician. This would seem to be pushing a rule of law applicable to the relation of landlord and tenant to a point which makes it very unreasonable, if not absurd, and, before assenting to such an application of it, we are naturally forced to inquire whether there was in fact any such holding over by the tenant in this case as the rule fairly contemplates. Does a tenant who, on the last day of the term is upon his deathbed, or is quarantined in his house by the public authorities to prevent the spread of some dangerous or infectious disease, or is insane or compelled to remain in the house against his will by some superior force or stress of circumstances, hold over within the meaning of the law, or in the sense that permits the landlord to treat him as a tenant for another year? The principle upon which the rule is founded is that the holding over is such an act of the tenant that the law implies a contract on his part, or leasing of the premises for another year. But whenever the law implies a contract from the act or conduct of the party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract or obligation from an act of the party which proceeds from mistake or fraud, or which results from force or coercion of any kind, or is due to any stress of circumstances which involves peril to his life

or that of some member of his family. To infer a promise or contract from any act plainly resulting from such causes would manifestly be contrary to reason and justice. The question, therefore, occurs whether the tenant in this case, by failing to remove his mother from the bedroom in the house, or by her presence there during the fifteen days after the expiration of the term, should be held for another year's rent, on the principle that an agreement to hold for another year is to be implied by law from his conduct under the circumstances. If this question must necessarily be answered in the affirmative, there would be no grounds for any further discussion. But it seems to me that, upon reason and all the analogies of the law, a hiring for another year cannot and should not be implied against the tenant under such circumstances. The case is not within the reason of the rule, and, therefore, is not governed by it. While this court has firmly adhered to the principle that the landlord is entitled to treat the tenant who holds over as a lessee for another year, it is plain, from what was said in one of the most recent cases, that the rule was not considered an arbitrary one. On the contrary, it is intimated that it was not so rigid that it could not properly be made to bend in exceptional and peculiar cases: *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636. Where the holding over is wrongful or voluntary, and not unavoidable in the strictest sense, the rule must be permitted to have full application. But where the tenant, as in this case, is obliged to retain a room in the house for a short period of time in order to avoid the peril of exposing a member of his family to danger and death, it cannot properly be said that it is a holding over within the meaning of the law. Where a party acts under such a stress of circumstances, the act cannot be said to proceed from his own volition any more than if he had been detained in the house by the police under the direction of the health authorities. * * *

Note: There is an extensive note upon the subject of this case in 70 Am. St. Rep. 533.

Note: In *Mason v. Wierengo's Estate*, 113 Mich. 151; 67 Am. St. Rep. 461; 71 N. W. 489; it was held: Where the tenant for a term of years held over the option of the landlord to treat his act as a renewal of the lease for another year, is not affected by the severe illness and subsequent death of the tenant. The decision of the court is based upon its holding that the act of God does not excuse a lessee from the performance of his express contract.

CHAPTER VIII.

ESTATES ON CONDITION.

- Section 1. Conditions in General.
- Section 2. Construction Adverse to Conditions.
- Section 3. Conditions Precedent or Subsequent.
- Section 4. Impossible Conditions.
- Section 5. Conditions Against Marriage.
- Section 6. Repugnant Conditions.
- Section 7. Waiver of Condition.

SEC. 1. CONDITIONS IN GENERAL.

VAN RENSSELAER v. BALL.

19 N. Y. 100. (1859)

Action in the nature of ejectment, brought to recover the possession of one hundred and twenty-one and a half acres of land in the town of Berne, in the county of Albany, tried before Mr. Justice W. F. Allen, without a jury, in January, 1857.

The plaintiff gave in evidence an indenture executed by Stephen Van Rensselaer, the elder, now deceased, and William Ball, dated October 20th, 1792, by which the former conveyed to Ball the premises in question, in fee, reserving an annual rent, payable in wheat and fowls, and in a day's service each year. The indenture contains a covenant for the payment of rent, and clauses of distress and for re-entry, in all respects like those contained in the conveyance given in evidence in the case of *Van Rensselaer v. Hayes*, 19 N. Y. 68. It was proved that W. Ball, the grantee, died about twelve or fourteen years before the trial, and that the defendant, his son, was in possession of a part of the premises, which was described in the testimony, having entered under his father. The defendant had paid rent for his father during his lifetime; but it did not appear that any rent had been paid since his death. The death of Stephen Van Rensselaer the elder was proved, and his will devising to plaintiff his rents was given in evidence. * * *

DENIO, J. A condition annexed to a conveyance in fee, that the grantee, his heirs and assigns shall pay to the grantor and his heirs an annual rent, and that in default of payment the grantor or his heirs may re-enter, is a lawful condition. Littleton puts it as an example of a condition in deed, at the commencement of that part of his treatise which relates to estates upon condition. Such an estate, he says "is as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs, yearly, a certain rent payable at one feast or divers feasts, per annum, on condition that if the rent be behind, etc., that it shall be lawful for the feoffor and his heirs to enter, etc., and if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, etc., that then it shall be lawful for the feoffor, or his heirs to enter, etc. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them of his former estate, to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed," etc. (§ 325.) The systematic writers upon the law of real property, from that time to the present, have assumed the legality of such conditions; and the substance of the condition in the conveyance under consideration is usually put as an example. 2 Bl. Com. 154; Cruise's Dig., vol. 2, ch. 1, par. 1, pl. 3, 9; 4 Kent Com. 123. Among the numerous authorities referred to by the defendant's counsel, I have been unable to find a single *dictum* or the slightest hint that such conditions were contrary to law, or that they could only be attached to estates for life or years, or that a common-law tenure between the parties, or a reversion in the grantors, were necessary to uphold them.

* * *

RICE v. BOSTON & W. R. CORP.

12 Allen, (Mass.) 141. (1866)

Writ of entry to recover a parcel of land in Brighton.

At the trial in the Superior Court, before Vose, J., it appeared that on the 12th day of May, 1834, the demandant's father conveyed the demanded premises to the tenants by a deed of warranty, which stated that the conveyance was made upon the express condition that the corporation should forever maintain and keep in good repair a pass-way over the same, and also certain fences; the premises being land over which the railroad of the tenants passes. The demandant's father then in June, 1842, conveyed to the demandant a large tract of land, the description of which included the demanded premises, by a deed of warranty; and died intestate, before any breach of condition. The demandant offered evidence of a breach of condition after his father's death. No entry for breach of condition was made before bringing this action. The judge excluded the offered evidence, and instructed the jury that the demandant was not entitled to recover; and a verdict was accordingly returned for the tenants. The demandant alleged exceptions.

BIGELOW, C. J. It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by deed to a third person before entry for a breach. This rule is stated in Co. Lit. 214a, in these words: "Nothing in action, entry, or re-entry can be granted over;" and the reason given is "for avoidance of maintenance, suppressing of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." This ancient doctrine had its origin in the early Statutes against maintenance and champerty in England, the last of which, 32 Henry VIII, c. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or as Coke expresses it, "the grantor and grantee (albeit the grant be merely void) are within the danger of the statute." Co. Lit. 369a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text-writers and courts of justice. 2 Cruise Dig. (Greenl. Ed.) tit. xiii, c. 1, 15; 1 Washburn on Real Prop. 453; 2 Ib. 599; 1

Smith's Lead. Cas. (5th Ed.) 113; Nicoll v. New York & Erie Railroad, 12 N. Y. 133; Williams v. Jackson, 5 Johns. (N. Y.) 498; Hooper v. Cummings, 45 Me. 359; Guild v. Richards, 16 Gray, 309.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 157, 158: A condition "may be discharged by matter *ex post facto*; as in the examples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition (I, d 11), the rule is said to be "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." See also 1 Washburn on Real Prop. 453; Hooper v. Cummings, 45 Me. 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities, it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds, on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished, so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor alienates the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est haeres viventis*; and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had alienated in his lifetime. The right of entry is gone forever. Perkins, 830-833; Lit. 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities already cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of law. Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. *Stearns on Real Actions*, 226.

We know of no statute which has changed the rules of the common law in this commonwealth in relation to the alienation of a right of entry for breach of a condition in a deed. By these rules, without considering the other grounds of defense insisted upon at the trial, it is apparent that the demandant cannot recover the demanded premises: not as heir, because he did not inherit that which his father had conveyed, in his lifetime; nor as purchaser, because his deed was void.

Exceptions overruled.

In *Ruch v. Rock Island*, 97 U. S. 693; 24 L. Ed. 1101. (1878) it was said: "It was not denied by the plaintiff that the title had

passed, and that the estate had vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger. Conceding the facts to have been as claimed by the plaintiff in error, this was fatal to his right to recover, and the jury should have been so instructed. *Webster v. Cooper*, 14 How. 488; *Davis v. Gray*, 16 Wall. 203; 1 *Shep. Touch.* 149; *Winn v. Cole's Heirs*, 1 Miss. 119; *Southard v. Central Railroad Co.*, 26 N. J. L. 13; *Rector, &c. of King's Chapel v. Pelham*, 9 Mass. 501; *Parker v. Nichols*, 7 Pick. (Mass.) 111; *Nicholl v. New York & Erie Railroad Co.*, 12 Barb. (N. Y.) 460; *Bank v. Kent*, 4 N. H. 221; *Cross v. Carson*, 8 Blackf. (Ind.) 138; *Hooper v. Cummings*, 45 Me. 359; *Propagation of the Gospel in Foreign Parts*, 2 Paine, 545; *Underhill v. Saratoga & Washington Railroad Co.*, 20 Barb. (N. Y.) 455; *Shannon, Adm'r v. Fuller*, 20 Ga. 566; *Thompson v. Bright*, 1 Cush. (Mass.) 428.

Bringing suit for the premises by the proper party is sufficient to authorize a recovery, without actual entry or a previous demand of possession. *Cornelius v. Ivins*, 2 Dutch, (N. J.) 376.

The judgment of the Circuit Court is

Affirmed.

SEC. 2. CONSTRUCTION ADVERSE TO CONDITION.

PEDEN v. CHICAGO, R. I. & P. RY. CO.

73 *Iowa* 328; 5 *Am. St. Rep.* 680; 35 *N. W.* 424. (1887)

On the fifteenth day of March, 1871, Joseph Peden executed a conveyance to the Chicago & Southwestern Railroad Company, whereby he conveyed a right of way across a tract of land then owned by him. The company soon afterwards constructed a railroad on the strip of land so conveyed to it. The consideration named in the conveyance is one dollar, and the instrument contains the fol-

lowing provision: "The water on the south-east side of the road to be *made* to run on same side of road, instead of through the cattle-guards." The railroad was constructed in such manner through the premises that the surface water which collected on the south-east side of the track was conducted along that side to a creek, except in times of great rain-fall, when a portion of it flowed across the track, and spread over the lands on the other side. In 1875 the defendant purchased the railroad, and since that time has operated it. In 1878 Joseph Peden sold the land to plaintiff, James M. Peden. After defendant purchased the railroad, it constructed a wooden culvert through the embankment. It also opened the cattle-guard, which was originally so constructed that no water flowed through it. These openings afforded a passageway for the water which collected on the south-east side of the track, through which it flowed, and spread over the land on the opposite side. The openings were constructed before plaintiff purchased the land, but after his purchase defendant replaced the wooden culvert with one of much larger dimensions, which was built of stone. This action was brought for the recovery of damages for the injury which plaintiff alleges was done to his land and the growing crops thereon by the waters which flowed through said openings, after his purchase of the land. Plaintiff recovered a verdict and judgment, and defendant appealed.

REED, J. 1. Appellant claimed that the provision in the deed is a condition subsequent, and, being a condition in deed and not in law, the right to take advantage of the breach rests alone with him who created it, and the estate to which it attaches. But the District Court ruled that the provision is an independent covenant. This ruling is correct. As conditions subsequent tend to destroy estates, they are not favored in law. They are always strictly construed. And if it is reasonably doubtful whether a provision in the conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter. But looking at the language of the present provision, and the objects which the parties had in view in the whole transaction, we think there is no doubt but it was intended as a covenant, rather than a condition attached to the estate. There is nothing in the language made use of which indicates that it was the intention that the estate conveyed should revert on the failure of the grantee to do the thing stipulated for; nor was there anything in the circumstances of the transaction indicating that such was their intention. The railroad company sought to acquire the land for use in connection with other

lands, as a right of way for a line of railroad hundreds of miles in length, and the grantor conveyed it to them for that purpose.

The thing stipulated for was to be done after the road should be constructed. But when that was done the land conveyed by the grant became a part of the road and its forfeiture would involve a material change in the line of the road, which could only be accomplished by a great expenditure of money. Surely the parties had no such result in view when they inserted the provision in the deed. The provision is very different in its terms from the one involved in *Close v. Railway Co.*, 64 Iowa, 149, 19 N. W. Rep. 886. In that case the conveyance was of a strip of ground to be used for depot purposes, and the deed recited that it was made in consideration of one dollar and the permanent location of a depot on the ground. We held that this was not a promissory undertaking by the grantee to maintain a depot on the ground for all time, but was a condition of the grant for the breach of which the remedy of the grantor was to declare a forfeiture. In that case, by the language made use of, the grant is upon the conditions named. The land was conveyed for depot purposes, and upon condition that it should be so used. But in this the stipulation is as to a matter independent of the grant, and of the use to which the land was to be devoted.

2. The District Court also ruled that the covenant is attached to the land, and that defendant is responsible for such injuries as are the consequence of its own acts in violation of the agreement. The covenant is an agreement by the covenantor that it will, for all time, maintain its railroad and appurtenances on the land in such condition that the surface waters accumulating on one side shall be prevented from passing over onto the land on the opposite side. It concerns, then, both the land conveyed by the deed and that retained by Peden, and it formed part of the consideration for which the lands were parted with. Mr. Washburn states the rule on the subject established by the authorities in the following language: "Such covenants, and such only, run with the land, as concern the land itself, in whosoever hands it may be, and form part of the consideration for which the land, or some interest in it, is parted with between the covenantor and covenantee." 2 Washb. Real Prop. 298. * * *

Reversed.

RAWSON v. SCHOOL DISTRICT NO. 5, IN UXBRIDGE.

7 *Allen (Mass.)* 125; 83 *Am. Dec.* 670. (1863)

Writ of entry to recover a parcel of land in Uxbridge. It was agreed that the demanded premises were part of a lot of land described in a deed from Daniel Taft to the inhabitants of Uxbridge, dated March 20, 1737, for and in consideration of love and affection and for divers other valuable considerations, to the said town of Uxbridge, "to their only proper use, benefit, and behoof, for a burying-place forever." The land had been used by the town as a burying-place for many years. In 1860 the town sold the premises to tenants, who entered and inclosed them and used the land for school purposes, and no other. Amariah Taft, an heir of said Daniel, entered upon the land for breach of the condition of said deed, and gave notice of the entry to the town and to the tenants, and made and delivered upon the premises a deed thereof to the demandant. Judgment was rendered for demandant, and the tenants appealed.

BIGELOW, C. J. The construction of the deed from the demandant's ancestor to the town of Uxbridge, is not free from difficulty; but upon careful consideration, we are of opinion that, adhering in its interpretation, as we are bound to do, to the strict rules of the common law respecting grants of real property, we cannot construe it as a deed upon condition.

It is said, in *Shep. Touch.* 126, that "to every good condition is required an external form;" that is, it must be expressed in apt and sufficient words, which, according to the rules of law, make a condition; otherwise it must fail of effect. This is especially the rule applicable to the construction of grants. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument: *Co. Lit.* 205b, 219b; 4 *Kent. Com.*, 6th ed., 129, 132; *Shep. Touch.* 133; *Merrifield v. Cobleigh*, 4 *Cush.* 178, 184.

In the deed on which the present controversy arises, there are, strictly speaking, no words of condition, such as of themselves import

the creation of a conditional estate. The usual and proper technical words by which such an estate is granted by deed are "provided", "so as", or "on condition". Lord Coke says: "Words of condition are *sub conditione, ita quod, proviso*"; Mary Portington's Case, 10 Coke, 42a; Co. Lit. 203a, 203b. So a condition in a deed may be created by the use of the words *si*, or *quod si contingat*, and the like, if a clause of forfeiture or re-entry be added: Co. Lit. 204a, 204b; Duke of Norfolk's Case, Dyer, 138b; 1 Wood on Conveyancing, 290. In grants from the crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention, or on payment of a certain sum. But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a feoffment in fee *ea intentione, ad effectum, ad propositum*, and the like, the estate is not conditional, but absolute, notwithstanding: Co. Lit. 204a; Duke of Norfolk's Case, Dyer, 138b; 1 Wood on Conveyancing, 290; Shep. Touch. 123. These words must be conjoined in a deed with others giving a right to re-enter or declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional.

It is sometimes said that the words *causa* and *pro*, when used in deeds, create a condition; that is, where a deed is made in express terms for a specific purpose, or in consideration of an act to be done or service rendered, it will be interpreted as creating a conditional estate. But this is an exception to the general rule, and is confined to cases where the subject-matter of the grant is in its nature executory; as of an annuity to be paid for service to be rendered or a right or privilege to be enjoyed; in such case if the service be not performed or the enjoyment of the right or privilege be withheld which formed the consideration of a grant, the grantor will be relieved from the further execution of the grant, to wit, the payment of the annuity: Shep. Touch. 124; Cowper v. Andrews, Hob. 41; Co. Lit. 204a. But ordinarily the failure of the consideration of a grant of land, or the non-fulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. The reason for this distinction between the two classes of cases is, as stated by Coke, "that the state of the land is executed, and the annuity executory": Co. Lit. 204a. There is one other class of grants

which are sometimes said to be conditional; as when a feoffment is made *ad solvendum*, "for the matter shows that the intent of the feoffer was to have the land or the money;" or a grant *ad erudiendum filium*, "because the words purport that the instruction is to be given, or the feoffment will be void." It may be doubtful whether such words do operate in strictness as a condition. The latter case is stated in the Touchstone doubtfully, in this wise: "Some have said this estate is conditional". But if grants so expressed can be construed to create a condition by which to defeat an estate on breach and entry, it is clear that such an interpretation of them is confined to cases where the whole consideration of the grant is the accomplishment of a specific purpose, and the enjoyment of the estate granted is clearly made dependent on the performance of an act or the payment of money for the use or benefit of the grantor or his assigns. We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus it is said in *Duke of Norfolk's Case*, Dyer, 138b, that the words *ex intentione* do not make a condition, but a confidence and trust. See also *Parish v. Whitney*, 3 Gray, 516, and *Newell v. Hill*, 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not, of itself, make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on consideration of supposed hardship or want of equity.

In the light of these principles and authorities, we cannot interpret the words in the deed of the demandant's ancestor, which declare that the premises were conveyed "for a burying-place forever," to be

words of strict condition. Nor can we gather from them that they were so intended by the grantor. The grant was not purely voluntary. It was only partially so. It was not made solely in consideration of the love and affection which the grantor bore towards the grantees, but also "for divers other valuable considerations me moving hereunto." Previously to the time of the grant, the premises had been used for a burial-place. It is so described in the deed. Under what circumstances this had been done, does not appear. It may have been for a compensation. We cannot now know, therefore, that the sole cause or consideration which induced the grantor to convey the estate to the town was, that it should be used for the specific purpose designated in the deed. There can be no doubt of the intent of the grantor that the estate should always be used and appropriated for such purpose. This intent is clearly manifested; but we search in vain for any words which indicate an intention that if the grantees omitted so to use them, and actually devoted them to another purpose, the whole estate should thereupon be forfeited, and revert to the heirs of the grantor. The words in the deed are quite as consistent with an intent by the grantor to repose a trust and confidence in the inhabitants of the town, for whom he declared his affection and love, that they would always fulfill the purpose for which the grant was made, so long as it was reasonable and practicable so to do, as they are with an intent to impose on them a condition which should compel them, on pain of forfeiture, to maintain the premises as a burial place for all time, however inconvenient or impracticable it might become to make such an appropriation of them. Language so equivocal cannot be construed as a condition subsequent without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication.

Judgment for the tenants.

STUART v. CITY OF EASTON ET AL.

170 U. S. 383; 18 Sup. Ct. 650; 42 L. Ed. 1078. (1898)

By an act of the general assembly of the province of Pennsylvania, passed on March 11, 1752, the county of Northampton was erected out of a portion of the county of Bucks. In the sixth and seventh clauses of the act it was provided as follows:

"(6) And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town (of Easton,) in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants.

"(7) And be it enacted by the authority aforesaid, that for the defraying the charges of purchasing the land, building and erecting the court house and prison aforesaid, it shall and may be lawful to and for the commissioners and assessors of the said county, or a majority of them, to assess and levy, and they are hereby required to assess and levy so much money as the said trustees, or any three of them, shall judge necessary for purchasing the land and finishing the said court house and prison. Provided, always, the sum of money, so to be raised, does not exceed three hundred pounds, current money of this province."

On March 4, 1753, an act was passed in which it was recited that the amount specified in the act of March 11, 1752, had been expended in building a prison, and authority was given to assess and levy a further sum not exceeding a stated amount, as the persons named in the act, or any three of them, should judge necessary, for building a court house and finishing the prison already erected.

On September 8, 1764, a patent was executed as follows:

"Thomas Penn & Richard Penn Esquires true and absolute Proprietaries and Governors in Chief of the Province of Pennsylvania & Counties of Newcastle Kent and Sussex upon Delaware. To all unto whom these Presents shall come Greeting Whereas in and by said Act of General Assembly of the said Province passed in the twenty fifth year of the Reign of our late Sovereign Lord the Second Instituted 'An Act for Erecting the North West part of Bucks into a

separate County' which in and by the said Act is called Northampton and John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse or any of them are appointed Trustees to purchase and take Assurance to them and their Heirs of a Piece of Land situate in some convenient Place in the Town of Easton in the said County and thereon to erect and build a Court House & Prison sufficient to accommodate the public Service of the said County as by the said Act appears. And whereas in Pursuance of a Warrant dated the ninth of July 1762 under the Seal of our Land Office we have at the special Instance & Request of the said Trustees caused a Lot of Ground situate in the Center of the said Town of Easton to be laid out for a Court House for the Public Use and Service of the said County (another Lot of Ground in the said Town having been heretofore laid out for a Prison or Common Goal erected thereon) which said lot in the Center Square contains in Length North and South eighty feet and in Breadth East and West eighty feet As by the said Warrant and Survey of the said Lot remaining in the Surveyor Generals Office and from thence Certified into our Secretary's Office more fully appears. Now know ye that for the further Encouragement and better promoting the Public Benefit and Service of the said Town and County And for and in Consideration of the yearly Quitrent herein after reserved | and of the sum of Five Shillings to us in Hand paid by the said Trustees (The Receipt whereof is hereby acknowledged) We have given granted released confirmed & by these Presents do give grant release and confirm unto the said Trustees John Jones, Thomas Armstrong, James Martin, John Rinker, and Henry Allshouse and their Heirs the said Lot of Ground situate in the Center of the Great Square in the said Town of Easton containing Eighty feet in Length North & South and eighty feet in breadth East and West Together with all Ways Waters Watercourses Liberties Easements Privileges Profits Commodities Advantages and Appurtenances thereto belonging And the Reversions and Remainders thereof To have and to hold the said herein before described Lot of Ground with the Appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse their Heirs and Assigns for ever In Trust nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever to be holden of us our Heirs and successors Proprietaries of Pennsylvania as of our Manor of Fermor in the County of Northampton aforesaid in free and common Soccage

by Fealty only in Lieu of all other Services Yielding & Paying therefor yearly unto us, our Heirs and Successors, at the Town of Easton aforesaid at or upon the first day of March in every Year from the first day of March next one Red Rose for the same or value thereof in Coin Current according as the Exchange shall then be between our said Province and the City of London to such Person or Persons as shall from Time to Time be appointed to receive the same And in Case of Nonpayment thereof within ninety days next after the same shall become due That then it shall and may be lawful for us our Heirs and Successors our and | their Receiver or Receivers into and upon the hereby granted Lot or Piece of Ground and Premises to Reenter and the same to hold and Possess until the said Quitrent and all arrears thereof Together with the Charges accruing by Means of such Nonpayment and Reentry be fully paid and discharged.

"Witness John Penn Esquire Lieutenant Governor of the said Province who by virtue of certain Powers and Authorities to him for this Purpose inter alia granted by the said Proprietaries hath hereunto set his Hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this twenty-eighth day of September, in the Year of our Lord one thousand seven hundred and sixty four The Fourth year of the Reign of George the Third the King over Great Britain &c And Forty seventh Year of the said Proprietaries Government."

A court house was built upon the property between the years 1763 and 1766, and remained thereon until the year 1862, when it was removed. No buildings have since been placed upon the ground, but it was asserted in argument that a public fountain had been erected thereon.

By an act of the general assembly of Pennsylvania of date April 15, 1834, the title of the trustees was vested in the county of Northampton.

On July 25, 1888, William Stuart, as sole heir of the original grantors, by his duly authorized attorney, made entry upon the lot in question for a breach of an alleged condition as to its use, claimed to have been incorporated in the patent of 1764, and which, it was asserted, revested the land in the claimant as succeeding to the rights of the original grantors. Being ousted by the representatives of the county of Northampton and the citizens of Easton, Stuart soon after instituted an action of ejectment in the United States circuit court for the Eastern district of Pennsylvania to recover possession of the land.

At the close of the testimony for the plaintiff, counsel for defendant moved the court to direct a verdict for the defendant. This motion was granted, the court instructing the jury that the deed on its face was a conveyance to trustees for the use and benefit of the people of Northampton county in the erection and use of public buildings, and that the land had not reverted to the grantors by a diversion of the use. * * *

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court. * * *

Did the trial court improperly direct a verdict for the defendant?

This question requires an interpretation of the grant contained in the patent of 1764; and, as the question arising on such construction relates to the title to real property, we must, in reaching a conclusion, be guided by the local law of Pennsylvania, the state in which the land is situated.

We premise our examination of the terms of the patent with the following extract from the opinion delivered by Kenhedy, J., in *Ingersoll v. Sergeant*, 1 Whart. 337, 348:

"King Charles the Second, in granting the province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage, and by fealty only, for all services; and by the seventeenth section thereof William Penn, his heirs and assigns, had full and absolute power given to them, at all times thereafter, and forever, to assign, alien, grant, demise, or enfeoff such parts and parcels thereof to such persons as might be willing to purchase the same, their heirs and assigns, in fee simple, fee tail, for term of life, lives, or years, to be held of the said William Penn, his heirs and assigns, as of the seigniorship of Windsor, by such service, customs, and rents as should seem fit, to the said William Penn, his heirs and assigns, and not immediately of the said King Charles, his heirs or successors; and, again, by the eighteenth section, it was further provided that the purchasers from William Penn, his heirs or assigns, should hold such estates as might be granted to them, either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns, should seem expedient, the statute of *quia emptores terrarum* in any wise notwithstanding."

The proper construction of the patent in question is free from difficulty when construed in connection with the act of the assembly to which the patent refers. The act of 1752 constituted the authority of the trustees for acquiring the land in question, and that authority was to the individuals named in the act "to purchase and take assur-

ance to them and their heirs of a piece of land situate in some convenient place in the said town of Easton, in trust, and for the use of the inhabitants of the said county." The inhabitants of the county of Northampton, not being a corporation, were unable to take a direct conveyance of the land, but the clear intention of the statute was that, while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county. The provision following the authorization to acquire the land, "and thereon to erect and build a court house and prison," was no more than a direction to the trustees as to the mode of use to be made of the land after it had been purchased.

The authority to the trustees, being to "purchase," adds force to the clear implication that it was the intention of the assembly that a title in fee simple should be acquired. When, therefore, we find a recital in the patent that it is conveyed upon a named consideration, and the patent expressly refers to the act of the assembly as the authority from which the patentees derived the power to take and hold the property, we naturally infer an intention of the parties on the one hand to convey, and on the other to receive, just such an estate in the land as the act contemplated. It is true that the consideration is apparently nominal, but at common law, in a deed like the one in question, a pecuniary consideration, however small, was sufficient to divest the title. *Reg. v. Porter*, 1 Coke, 24, 26; *Van Der Volgen v. Yates*, 9 N. Y. 219.

The patent expressly purports to convey the fee, the reservation of an annual quitrent of a red rose being merely a feudal acknowledgment of tenure (*Marshall v. Conrad*, 5 Call. 364, 398), which was in effect annulled by the Revolution and acts of the assembly of Pennsylvania subsequently passed, declaring all lands within the commonwealth to be held by a title purely allodial. In the premises the grant is to the trustees by name "and their heirs," while the *habendum* is to the individuals theretofore referred to as the trustees, "their heirs and assigns, forever. In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent, or purpose whatsoever." This last clause, it is claimed, qualifies the prior grant of an estate in fee, and limits the duration of the estate in the land to the period while the land was used as the site of a court house. But it will be remembered that the act of 1752 authorized the acquisition of a lot upon which the trustees were directed to build a court house and prison, and the act of 1753 recited that the amount authorized by the

act of 1752 to be expended for a court house and prison had already been expended for building a prison, and authority was given to assess and levy a further sum for the erection of a court house. The patent of 1764 recited the fact that another lot of ground had been laid out for a prison site, and it may be well in reason considered that, had the act of 1752 authorized solely the erection of a court house instead of a court house and prison, the clause to which we have referred would have simply recited that the patentees were to hold the land for the uses and purposes mentioned in the act of the assembly. In the condition in which matters stood, however, the recital that the land was to be held in trust for the object stated may well be treated as having been inserted with the intent of showing that the grant related alone to one of the purposes covered by the law, the court house, and not to both therein expressed; that is, the prison and the court house. Be it as it may, however, under the facts disclosed by the record, the decisions of the courts of Pennsylvania leave no doubt that the clause in question cannot be construed as anything more than a recognition of the trust previously created by the act of the general assembly, and that it amounted simply to conforming the grant to the legislative authority previously given, and that it cannot be deemed to have imported a limitation of the fee. Thus in *Slegel v. Lauer*, 148 Pa. St. 236, 23 Atl. 996, while it was held that the grant there considered, though absolute in terms, merely conveyed a fee on limitation, because the purpose expressed in the grant was not one for which counties usually acquired a fee simple in lands, the court reviewed the cases of *Kerlin v. Campbell*, 15 Pa. St. 500; *Griffitts v. Cope*, 17 Pa. St. 96; *Brendle v. Reformed Congregation*, 33 Pa. St. 415; and *Seebold v. Shitler*, 34 Pa. St. 133; and declared the doctrine established by those cases to be that where a conveyance purporting to be in fee is made to public trustees or commissioners, religious societies, etc., for the particular purpose for which the grantees could lawfully hold real estate, such declaration could not be construed as qualifying a prior grant of the fee. The court said (148 Pa. St. 241, 23 Atl. 997):

“Of course, the mere expression of a purpose will not of and by itself debase a fee. Thus, a grant in fee simple to county commissioners of land ‘for the use of the inhabitants of Delaware county, to accommodate the public service of the county,’ was held not to create a base fee (*Kerlin v. Campbell*, 15 Pa. St. 500); as also a grant to county commissioners and their successors in office of a tract of land with a brick court house thereon erected ‘in trust for

the use of said county, in fee simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a court house, jail and offices for the safe-keeping of the records (*Seebold v. Shitler*, 34 Pa. St. 133). Similarly a devise of land to a religious body in fee, 'there to build a meeting house upon,' etc., was held to pass an unqualified estate (*Griffitts v. Cope*, 17 Pa. St. 96); as was also a grant to a congregation 'for the benefit, use, and behoof of the poor of said * * * congregation, * * * forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and, if occasion shall require, a place to bury their dead' (*Brendle v. Reformed Congregation*, 33 Pa. St. 415). * * *

"It is apparent in all the cases cited that the purposes for which the grants were made were really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can, in no event, take a fee simple absolute, because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration, in the grant, that it is conveyed for those uses cannot be deemed to import a limitation of the fee. '*Expressio eorum quae tacite insunt nihil operatur.*' Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant."

The case at bar is precisely analogous in its main features to the facts which were under consideration in *Kerlin v. Campbell*, *supra*, the only difference being that in the case just cited, instead of the purpose for which the land was to be held being specified in the grant, a declaration of trust was made in a separate instrument. The facts in the *Kerlin Case* were as follows: Certain public buildings had been erected on land, and the land, with the erections, was sold to a private individual. Subsequently, five named individuals, or any three of them, were authorized by statute "to take conveyances and assurances to them, and their heirs, of the said old court house, and of the prison and workhouse, in the said borough of Chester, with the lots of ground thereunto belonging, in trust and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county." A deed was made in pursuance of this act to the individuals named, "and to their heirs and assigns," for an expressed consideration, "to have and to hold the same to them, their heirs and assigns forever." A declaration of trust was made contemporaneously with the deed, reciting that the latter instrument had been made or was intended to be "in trust

and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the said recited act of assembly;" and also declaring that the interest held in the land and buildings was "only to and for the uses and services hereinbefore mentioned, expressed, and declared, and to and for no other use, interest, or purpose whatsoever." A part of the lot and the workhouse building thereon having been subsequently sold to a private individual under authority of an act of assembly, the heirs of the original grantor brought ejectment to recover possession, upon the ground that the property was granted for a grossly inadequate consideration, if the unrestricted fee was conveyed, and that the deed to the individuals named in the original act and the declaration of trust by them executed was but a single transaction, and constituted a conveyance to the parties named, in trust to and for the use of the inhabitants of the county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the act of assembly, and to no other use, intent, or purpose whatsoever, and that the estate which the trustees took was a base or determinable fee; in other words, an interest which might continue forever, but was liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. On the part of the defendants in error it was contended that the transaction was a purchase, and not a trust. The court said (page 506):

"The doctrine of charitable uses is inapplicable to a question like the present. Had the ancestor of the plaintiff conveyed the property as a gratuity, to be used in a particular way, he might have a plausible case on the cessation of the user; but he conveyed it for its value, by an absolute deed, to persons who executed a declaration of trust, not for his benefit, but to vest the equitable ownership in the county. After that, it is impossible to conceive of a dormant interest in him. The two deeds, though executed at the same time, were as diverse as if the latter were a conveyance of the legal title to a stranger, with whom the grantor in the first could not be in privity. There could be no resulting trust, for every part and particle of the grantor's estate, legal or equitable, present or prospective, had passed from him and was paid for. Nor was the estate granted a base fee. It was unclogged with conditions or limitations. The ancestor received a full consideration for it, and the plaintiffs cannot rescind the bargain."

We think the two cases are not distinguishable in principle. The

purpose of the grant by the patent of 1764 of the lot in the center of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title. While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, conjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted, and a declaration of the trust made in an independent instrument.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words, such as, "so that," "provided," "if it shall happen," etc. (4 Kent, Comm. p. 132, note b; 2 Washb. Real Prop. p. 3), contained in the grant, nor is the declaration of the use coupled with any clause of re-entry or a provision that the estate conveyed should cease or be void on any contingency (Id.). So, also, we fail to find in the patent the usual and apt words to create a limitation, such as "while," "so long as," "until," "during," etc. (4 Kent, Comm. p. 132, note b), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.

The cases mainly relied upon as supporting the claim of the plaintiff in error that by the patent an estate was conveyed which was "to be commensurate in duration with the purpose to be answered by it" clearly present no analogy in their facts to the case at bar. Thus, in *Kirk v. King*, 3 Pa. St. 436, the material part of the conveyance reads as follows:

"Know all men by these presents that I, Thomas McElroy, of Plum township, in the county of Allegheny, for and in consideration

of the sum of 50 cents to me in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the employers of the school at Plum Creek meeting house that lot of land, beginning [describing it]; to have and to hold said lot for an English school house, and no other purpose, for me, my heirs and assigns, to them who are now, or may, hereafter be, the employers of said school, to have and to hold the same forever for said purpose.

"Witness my hand and seal," etc.

It will be noticed that the deed did not contain words of inheritance or expressly purport to convey a fee simple; and in *Wright v. Linn*, 9 Pa. St. 433, the decision in *Kirk v. King* was construed to hold that "the legal title remained in the original owner, the 'school company' having but an equity, which was thought to be dependent on the agreement to use the ground 'for an English school house and for no other purpose.'" In other words, the deed was construed as making the substantial consideration of the grant the erection of the school house, and as though the land was conveyed, in terms, to the grantees, to have and to hold the same so long as they used it for an English school house. And the court, in the *Wright Case*, while questioning the correctness of the holding in the *Kirk Case*, that the deed there considered did not establish a trust for a charitable use, not liable to be defeated by nonuser, said (page 438):

"It has long been held that money given to build or repair a church is given to a charitable use, and surely it must be agreed that land given as the site of a public school house *prima facie* stands in the same category. It may be otherwise where the object in the contemplation of the party is ephemeral, and the subject sought to be promoted is intended to be of temporary duration. This is the point on which *Kirk v. King* was made to turn; and, where such is the case, perhaps the grant may be taken as on an implied condition of reverter as soon as the temporary object is accomplished. But such a condition should either expressly appear or be unerringly indicated by the circumstances attendant on the gift."

The object to be attained by the grant in the case at bar was, however, not ephemeral in its character, the assurance being expressly to the trustees, and their heirs and assigns, forever; while the attendant circumstances, we have heretofore alluded to, rebut any inference of an implied reverter. * * *

But, manifestly, under the authorities referred to in the *Slegel Case*, which we have above cited, the declaration of the purposes contained

in the patent under consideration had not the effect of qualifying or limiting the estate in fee expressly granted to the trustees for the benefit of the inhabitants of the county, and which has since become vested, by act of the legislature, in the county of Northampton. Without, however, positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752 (*Brendle v. Reformed Congregation*, 33 Pa. St. 415, 425), we hold that the trial court did not err in directing a verdict for the defendant, and the judgment of the Circuit Court of Appeals must therefore be affirmed.

SEC. 3. CONDITIONS PRECEDENT AND SUBSEQUENT.

BRENNAN v. BRENNAN.

185 Mass. 560; 102 Am. St. Rep. 363; 71 N. E. 80. (1904)

MORTON, J. This is a writ of entry to recover a certain parcel of land, with the buildings thereon, situated in Cambridge, to which the demandants claim title as heirs at law of one Maria J. Day. The tenant is a brother of the demandants and is in possession and claims title to the premises as devisee under the will of Maria J. Day, which has been duly proved and allowed. The demandants and the tenant are nephews and nieces of the testatrix and her heirs at law. The sole question is whether the tenant took an estate in fee simple or upon condition. The Superior Court ruled that he took an estate in fee simple, and the case is here on exceptions by the demandants to this ruling.

The clause under which the tenant claims title is as follows: "Second. All the rest, residue and remainder of my property both real, personal and mixed, I give, devise and bequeath to Francis J. Brennan, to him and his heirs forever, provided that he shall take care of me and look after me while I live." The clause is well drawn and aptly describes an estate upon condition. The word "provided" imports a conditional rather than an absolute estate (*Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692), and the nature of the devise, and the circumstances under which it was made, manifest, we think, an intention on the part of the testatrix to make a conditional rather than

an absolute gift. Her object was to make provision for her own care and comfort during the remainder of her life. Except for this object there was no apparent reason for making the tenant the recipient of her bounty to the exclusion of his brothers and sisters. It is true that he had assisted her in making arrangements for admission to the hospital, and that he had taken a mortgage to enable her to raise funds for the contemplated expenses of her sickness at the hospital. But a niece had taken care of her from the beginning of her illness down to the time of her admission to the hospital and would seem to have had as much claim upon her bounty as the tenant. There is nothing to show that the testatrix and the tenant had been on terms of intimacy, or that she had at any time displayed any particular regard for him. If the circumstances would warrant an inference that she expected thenceforward that their relations would be more intimate than they had been, there is nevertheless, nothing to show that she trusted to this expectation and the increased care for her comfort which might be expected to result from more intimate relations, as the sole ground of her bounty. The tenant relies upon *Colwell v. Alger*, 5 Gray, 67, *Martin v. Martin*, 131 Mass. 547, and *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379. But those cases are not applicable. In neither one of them was there, as here, a condition in terms. In *Colwell v. Alger*, 5 Gray, 67, it is expressly said of the clause relied on that "whatever else it might have meant, it was not a condition. It was not a condition in terms." Neither were the circumstances such in either one of those cases as to show that a devise upon condition was intended, and that the language should be so construed. The condition would seem to be a condition precedent rather than subsequent. It related to something to be done during the lifetime of the testatrix before the estate could vest, and there is nothing to show that it was performed by the tenant.

The fact that the tenant had no knowledge of the provisions of the will until after the death of the testatrix is immaterial, except so far as he takes as heir at law. In regard to this it is settled "that where the devisee, on whom a condition affecting real estate is imposed, is also the heir at law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof": *Jarman on Wills*, 6th ed., 853; *Kenrick v. Lord Beauchamp*, 11 East, 657, 667; *Taylor v. Crisp*, 8 Ad. & E. 779. It is true that in *Colwell v. Alger*, 5 Gray, 67, the court seems to lay down the proposition that a condition will not be valid which without notice

requires of a beneficiary the performance of acts during the lifetime of the testator, such as providing for his support: See Jarman on Wills, 6th ed. 841, note 2, by Mr. Bigelow. But the proposition thus laid down is contrary to the weight of authority and was not necessary to the decision: *In re Hodges' Legacy*, L. R. 16 Eq. 92; *Astley v. Earl of Essex*, L. R. 18 Eq. 290; *Roundel v. Currer*, 2 Bro. C. C. 67; *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74; *Merrill v. Wisconsin Female College*, 74 Wis. 415, 43 N. W. 104. * * *

EDWARDS v. HAMMOND.

3 *Lev.* 132. (1683)

Ejectment upon *Not guilty*, and special verdict the case was: A copyholder of land, borough English, surrendered to the use of himself for life, and after to the use, of his eldest son and his heirs, if he live to the age of 21 years; provided, and upon condition, that if he die before 21, that then it shall remain to the surrenderer and his heirs. The surrenderer died, the youngest son entered; and the eldest son being 17 brought an ejectment; and the sole question was, whether the devise to the eldest son be upon condition precedent, or if the condition be subsequent, *scil.* that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was precedent, and that the estate should descend to the youngest son in the mean time, or at least shall be in contingency and in abeyance till the first son shall attain to one and twenty; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the court, that though by the first words this may seem to be a condition precedent, yet, taking all the words together, this was not a condition precedent, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, *scil.* his not attaining the age of 21; and they resembled this to the case of Spring and Caesar, reported by Jones, J., and abridged by Roll. 1, Abr. 415, nu. 12. A fine to the use of B. and his heirs if C. pays him not 20s. upon Septemb. 10, and if C. does pay, to the use of B. for life, remainder to C. and his heirs, where the word *si* does not create a condition precedent, but the estate in fee vests presently in C. to be divested by payment afterwards; so here. Accordingly this case was adjudged in Mich. Term next following.

RICHARDSON v. PENICKS.

1 App. D. C. 261. Infra, p. 334.

BURDIS v. BURDIS.

96 Va. 81; 70 Am. St. Rep. 825; 30 S. E. 462. (1898)

RIELY, J. Joseph Burdis devised to his wife for her life his homestead and five acres of land, with the understanding that his son, Albert, would support and take care of her, and at her death the homestead and land should return to Albert as compensation therefor.

The wife of the testator died in his lifetime, and the matter to be determined is whether or not his son, Albert, is entitled, under these circumstances, to the homestead and land. This depends upon the question whether the condition upon which he was to have the property was a condition precedent to its vesting in him, or was a condition subsequent, the nonperformance of which would divest the estate given to him by the will.

The law is clear that where a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there be no default or laches on the part of the devisee himself (2 Jarm. Wills, 10; 4 Kent, Comm. 125; 2 Minor, Inst. 228); but if the condition is subsequent, and its performance becomes impossible, the rule is different. In that case the estate will not be defeated or forfeited, but the devisee will hold the property by an absolute title, as if no condition had been annexed to the devise. 2 Jarm. Wills, 11; 4 Kent, Comm. 130; Ridgway v. Woodhouse, 7 Beav. 437; Collett v. Collett, 35 Beav. 312; McLachlan v. McLachlan, 9 Paige, 534; Martin v. Ballou, 13 Barb. 119; Livingston v. Gordon, 84 N. Y. 140; Merrill v. Emery, 10 Pick. 507; Parker v. Parker, 123 Mass. 584; Morse v. Hayden, 82 Me. 227, 19 Atl. 443.

There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The same words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate

can vest, the condition is precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent. *Finlay v. King*, 3 Pet. 346; *Martin v. Ballou*, 13 Barb. 119; 4 Kent, Comm. 124.

The words, "with the understanding that my son, Albert, will support and take care of her," in the will under construction, which are relied upon as constituting a condition of the gift to the son, are not annexed thereto, but are connected with the devise to the testator's wife. The testator owned, in addition to what he called the "homestead," a tract of land of 107 acres, and the words which are coupled with the devise to the wife were manifestly assigned as a reason for the devise to her of the homestead and the five acres around it, and not as a condition of the gift to her; while the words, "as compensation therefor," which are attached to the devise to the son, do not constitute so much a condition of the gift to him as show the motive for it.

But if the language referred to be in legal effect a condition of the devise to the son, there is nothing in the will that makes the support and care of the wife of the testator by their son, Albert, necessarily precede the vesting in him of the estate in remainder, but much to indicate the contrary. The obligation relied upon as a condition precedent was not a single act, to be done or omitted at once, but a continuing condition, which might run through a long series of years and require the performance of many acts. The support and care of the wife was a continuing duty, as long as she might live. If she had survived the testator, she would have been only 45 years old at the time of his death, and would have had, according to all human calculations, many years still of expectation of life. There is nothing in the will to indicate that the testator intended the devise to the son to remain in "a state of contingency" during the many years that he might have the support and care of his mother, and it would be unreasonable to believe, without an express direction or plain implication in the will to that effect, that he so intended. Although he lived more than a year after the death of his wife, he left his will unchanged. By it he also required his son to support and provide for his two sisters, the younger of whom was only 15 years of age, as long as they might remain single,—an obligation that might terminate in the lifetime of the mother or continue long after her death. Taking the whole will together, as should be done, we are of opinion

that the condition upon which the testator's son, Albert, was to take the estate, was a condition subsequent, and not a condition precedent; and, its performance having been rendered impossible by the act of God in the death of the wife in the lifetime of the testator, Albert holds the estate by an absolute title, as if the testator had attached no condition to the devise.

In *Nunnery v. Carter*, 5 Jones, Eq. 370, the testator devised to his wife a tract of land for her life, with remainder to his son James. He also bequeathed to her certain slaves and other personal property for her life, and then "to be James Carter's, provided he take care of his mother; if not, to be whose that does take care of her." The wife in that case, as in the case at bar, died in the lifetime of the testator; and it was contended there, as it is here, that the slaves and other personal property were given to James upon a condition precedent, which being rendered impossible by the death of the tenant for life, the property never vested in him, but remained undisposed of and subject to be distributed as intestate property. The court, however, held that the condition, "though in form and appearance a precedent one, was in reality and legal effect, a subsequent condition, and, as such, could not, by becoming an impossible one, prevent the legacy from taking effect." It is true that it was the case of a legacy, and that the subject of the present controversy is a devise. While there is a difference between a legacy and a devise where the condition is precedent, there is no difference where the condition is subsequent, but, in the latter case, the estate to which the condition is annexed, whether it be land or a money legacy, if the performance of the condition be rendered impossible, becomes, by that event, absolute in the devisee as well as in the legatee. 2 Jarm. Wills, 10; *Finlay v. King*, 3 Pet. 346; *Martin v. Ballou*, 13 Barb. 119.

In *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151, the testator devised to his wife all his real estate for her life, the same to go to John Mehan at her death, if any remained, provided he maintained and provided for her decently from the proceeds of the farm or otherwise; but, if he failed to provide for her, then she was empowered to call on the selectmen to provide for her in her own house. The will also provided that John Mehan should be allowed to use the farm for the purpose of maintaining himself and the testator's wife by farming the same. It was held by the court that John Mehan took the estate upon a condition subsequent, but, having failed to perform the condition, the heirs or residuary devisees had the right to create

a forfeiture by an entry for that purpose, although the will contained no clause of that purport.

There is no error in the decree appealed from, and the same must be affirmed.

Note: See annotations to this case, 70 Am. St. Rep. 825, for further cases.

SEC. 4. IMPOSSIBLE CONDITIONS.

DAVIS v. GRAY.

16 Wall. (U. S.) 203; 21 L. Ed. 447. (1872)

* * * Except as to a small portion of the land in question the legal title is yet in the state. Whatever may be the right of the company it is wholly equitable in its character. With a few exceptions, which have no applicability in this case, the same rules apply in equity to equitable estates as are applied at law to legal estates. They are alike descendible, devisable, alienable, and barrable. (Citing cases.)

There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained. (Citing cases.) By the common law a freehold estate could not be created without livery of seisin, and it could not be determined without some act *in pais* of equal notoriety. Conditions subsequent are not favored in the law, and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor, or some one in privity of blood with him. In *Dumpor's Case* it was decided that a condition not to alien without license is finally determined by the first license given.

Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the state herself. By plunging into the war, and prosecuting it, she confessedly rendered it impossible for the company to fulfill during its continuance. This is alleged in the bill, and admitted by the demurrer.

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute. The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will, therefore, not apply the principle to that extent. It will regard the conditions as if no particular time for performance were specified. In such cases the rule is that the performance must be within a reasonable time. (Citing cases.) We are clear in our conviction that, under the circumstances, a reasonable time for performance had not elapsed when this bill was filed. As the state, by the act of July 27th, 1870, created the Southern Transcontinental Railroad Company, and authorized that company to "purchase the rights, franchises, and property, of the Memphis, El Paso, and Pacific Railroad Company," it will be but right to allow a reasonable time for that purchase to be made, if such an arrangement can be effected, and for the vendee thereafter to perform all that was incumbent upon the Memphis, El Paso, and Pacific Railroad Company by its charter and the supplementary and amendatory acts. If that arrangement cannot be made, the latter company will have the right to provide otherwise for the fulfillment of its obligations to the state within such time, and thus consummate its inchoate title to the lands within the reservation. Either will be in accordance with the principles of reason and justice, and within the spirit of well-considered adjudications. (Citing cases.)

Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred. Neither will be subjected to any serious hardship. The state, by her own acts, has lost the benefits of an earlier completion of the work. The company has lost the income which it might have enjoyed, and has doubtless been thrown into embarrassments it would have escaped. The circumstances do not call for a severe application of the rules of law upon either side.

Breaches of such conditions may be waived by the grantor expressly or *in pais*. Such waiver is expressed in the statute relating to the subject, to which we have referred, except the act creating

the Transcontinental Company, and there it exists by the clearest implication. * * *

Affirmed.

SEC. 5. CONDITIONS AGAINST MARRIAGE.

GILES v. LITTLE.

104 U. S. 291; 26 L. Ed. 745. (1881)

* * * MR JUSTICE WOODS, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is, that Edith J. Dawson took, under the will of her deceased husband, Jacob Dawson, an estate for life, subject to be determined in case she contracted another marriage, with remainder to the heirs of Jacob Dawson; and that the power of disposal conferred on her by the will was only coextensive with the estate which she took under the will,—that is to say, the power was granted her to dispose of her life-estate, and, consequently, that the estate conveyed by her deed to Cody determined upon her marriage with Pickering.

It was said by this court in *Clarke v. Boorman's Executors* (18 Wall. 493), Mr. Justice Miller delivering its opinion, that "of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of legal technical terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under the state of the science of law as applicable to the construction of wills it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

If we apply the methods thus indicated to the construction of the will of Jacob Dawson, there can, it seems to us, be no serious doubt about its meaning.

According to the averments of the petition, it appears that twelve

days before his death Dawson executed his last will. At that time he was the owner of some real estate, and of personal property of the value of \$958. He was the father of six living children, all of whom were minors, some of them very young, and all without any property in their own right. His wife, Edith J. Dawson, was the owner of real and personal property to the amount of \$10,000 or more.

The promptings of natural affection would lead a testator so situated to provide in his will not only for his wife, but also for his infant children.

The disposition of his property is made by a single sentence in his will. It seems clear that his purpose was to give to his wife an estate for life in his property, subject to be divested on her contracting a second marriage, and on the determination of her interest, either by her death or marriage, then an estate in fee to his children. No man unversed in technical rules of construction can, it seems to us, read this will without coming to this conclusion. To hold otherwise would be to suppose the testator, in drafting his will, was governed by abstruse rules of law in regard to the effect of the expressions, of which, it is probable, he never heard, and had not the slightest conception.

The clause of the will which disposes of the testator's entire estate provides first for the payment of his lawful debts. The residue of his estate (after payment of debts) is then disposed of as follows: "To my beloved wife Edith J. Dawson I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right and, authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow." This part of the disposing clause of the will is not open to doubt. The phrase, "so long as she shall remain my widow," refers to and qualifies the estate granted, as well as the power of disposition. The clear and undoubted meaning of the sentence is, that as long as the devisee remains the widow of the testator, his property, real and personal, shall remain and be hers, with full power to dispose of the same. This construction, so far as it concerns the estate granted, is so obvious that no discussion can make it any plainer. How large an estate the widow was empowered to dispose of will be considered hereafter.

But the testator, not satisfied with this unequivocal declaration of his purpose, and to leave no doubt of his intention, and to give direction to his property when the estate of his wife therein should

determine, proceeds to add: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should (shall) go to my surviving children, share and share alike."

It would be hard to express more clearly the purpose of the testator to devise to his wife an estate during her widowhood, and on its determination a remainder in fee to his children.

The contention, however, of the defendants in error is, that the testator by this will gave to his wife an absolute estate in fee-simple, with power, so long as she remained his widow, to dispose of it absolutely.

We find no warrant for this construction of the will, either in its terms or in the circumstances which surrounded the testator. The language is plain that the devisee was to take a life-estate, subject to be determined on her second marriage, with a limitation over to the children of the testator. His purpose was clearly expressed, to provide for his children as well as his widow, to give the latter all his estate as long as she remained his widow, but to put it out of her power to disinherit his children. According to the construction of the defendants in error, the will gave her the power of absolute disposition during her widowhood, so that she could by her conveyance entirely divert the estate from his children; and, having done this, could contract a second marriage without the loss of any interest in the proceeds of the property devised to her by the testator.

We think it was not the purpose of the testator to devise an estate in fee to his wife. As already remarked, the devise is limited by the words "so long as she shall remain my widow." But even if these words were wanting, the limitation over to his children in case she should marry again would control and restrict the preceding words by which the estate was granted.

Smith v. Bell (6 Pet. 68) is in point. The will construed in that case declares: "I give to my wife Elizabeth Goodwin all my personal estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use of said Jesse Goodwin," son of the testator; "and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament."

The court held that this was a devise to the testator's wife for

life, with remainder to Jesse Goodwin. Mr. Chief Justice Marshall, in delivering its opinion, said: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: 'The remainder of said estate to be for the use of the said Jesse Goodwin.' These words give the remainder of the estate, after his wife's decease, to the son, 'with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. * * * The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

This case establishes conclusively the contention of plaintiff in error, that the words of the will under consideration, granting an estate to the wife, grant only an estate for life, and not an estate in fee-simple. * * *

BOSTWICK v. BLADES.

59 Md. 231; 43 Am. Rep. 548. (1882)

ALVEY, J. * * * It would seem to be well settled by a great number of adjudications both in England and in this country, that conditions in general restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy, and therefore void. But this rule has never been considered as extending to special restraints, such as against marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good, on breach of the condition. A condition therefore that a widow shall not marry is by all the authorities held not to be unlawful. *Scott v. Tyler*, 2 Dick. 712; *Jordan v. Holkham*, Amb. 209; *Barton v. Barton*, 2 Vern. 308; 2 Pow. on Dev. 283; *O'Neale v. Ward*, 3 H. & McH. 93; *Binnerman v. Weaver*, 8 Md. 517; *Gough v. Manning*, 26 Md. 347; *Clark v. Tennison*, 33 Md. 85.

In the cases a distinction is taken between those where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent; and the decisions have generally been made to turn upon the question, whether there be a gift or devise over or not. But if the gift or devise be to a person until he or she shall marry, and upon such marriage then over, this is a good limitation, as distinguished from condition; as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt therefore that marriage may be made the ground of a limitation ceasing or commencing; and this whether the devisee be man or woman, or other than husband or wife. *Moreley v. Rennoldson*, 2 Hare, 570; *Webb v. Grace*, 2 Phill. 701; *Arthur v. Cole*, 56 Md. 100; s. c., 40 Am. Rep. 409. * * *

SEC. 6. REPUGNANT CONDITIONS.

COWELL v. SPRINGS COMPANY.

100 U. S. 55; 25 L. Ed. 547. (1879)

MR. JUSTICE FIELD delivered the opinion of the court.

In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250.00 and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterwards opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the con-

dition contained in its deed; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach the right of the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period,¹ or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by

the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. 14 Kan. 61. See also *Doe v. Keeling*, 1 Mau. & Sel. 95, and *Gray v. Blanchard*, 8 Pick. (Mass.) 283.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See also *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693. * * *

¹ Note: In *Potter v. Couch*, 141 U. S. 296, the rule is announced that notwithstanding the *dicta* in *Cowell v. Springs Co.*, a restriction on any and all alienation, although for a limited time of an estate in fee is void.

Compare this case with *Post v. Weil*, *Infra*, p. 685.

SEC. 7. WAIVER OF CONDITION.

MOSES v. LOOMIS ET AL.

156 Ill. 392; 47 Am. St. Rep. 194; 40 N. E. 952. (1895)

BAILEY, J. This was an action of forcible detainer, commenced before a justice of the peace, by Albert Moses against D. J. Loomis, E. W. Stevens, and R. S. Hopkins, to recover possession of certain premises in the city of Chicago, which the plaintiff had previously leased to Loomis & Stevens, and a portion of which had been underlet by them to Hopkins. Before the justice of the peace, the plaintiff recovered judgment against all the defendants, but, on appeal by the defendants to the Circuit Court, a trial was had before a jury, resulting in a verdict and judgment in their favor. On appeal by

the plaintiff to the Appellate Court, that judgment was affirmed, and this appeal is from the judgment of affirmance. * * *

The lease in question, which bears date April 28, 1893, was executed by the parties thereto under their respective hands and seals, and by it the plaintiff demised to Loomis & Stevens certain premises for the term of five years, commencing May 1, 1893. Among the covenants contained in the lease is one which provides that the lessees will not assign the lease, nor let or underlet the whole or any part of the premises, "nor make any alteration therein, without the written consent of said party of the first part, under the penalty of forfeiture and damages." It is claimed by the plaintiff that the lessees, in violation of this covenant, made certain alterations in the premises, by cutting through the floor, and the joists supporting the same, and putting in stairs, descending to the basement of the building, without his written consent, and that the plaintiff thereupon elected to forfeit the lease, and, after serving upon the lessees a written notice of such forfeiture and a demand for possession, brought this suit.

Evidence was given at the trial tending to show that the lessees made alterations in the premises as above stated, and that such alterations were made by and with the oral direction and consent of the plaintiff, and the court thereupon gave to the jury the following instructions: "If you believe, from the evidence, that the plaintiff, Moses, verbally authorized the defendants Stevens and Loomis to make the change, if any, which you may believe from the evidence was made in the building, this was a waiver by Moses of the provision of the lease that no alteration should be made without the written consent of Moses, as that provision was inserted in the lease for the benefit of Moses, and he had a right to waive it." The assignment of error upon which principal reliance is placed by the appellant is the one which calls in question the propriety of this instruction, and the argument by which the instruction is attacked is based wholly upon the old maxim of the common law that an instrument under seal cannot be varied or abrogated by the words not under seal. The contention is that, as the lease is under seal, the consent of the lessor to alterations in the premises, to be binding on him, could be given only in the mode prescribed in the lease, viz. in writing, and that his oral consent to such alterations, or even his express directions to the lessees to make them, are of no avail. It cannot be denied that the maxim thus sought to be invoked has repeatedly been recognized and applied in this state. *Barnett v. Barnes*, 73 Ill. 216; *Hume*

v. Taylor, 63 Ill. 43; Chapman v. McGrew, 20 Ill. 101. But the maxim is not applied in this state without various modifications. White v. Walker, 31 Ill. 422. Thus it is held that the release of a debt secured by a mortgage need not be under seal. Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334. And usually, where parties are bound to one another by writing under seal, the obligors will be discharged by parol proof of facts, if sufficient in themselves to constitute a discharge. So rights arising under sealed instruments may be waived by parol. Thus, where a lease contains a condition of forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition is broken, the lessor does any act which is clearly inconsistent with his reliance upon it, such as the acceptance of rent with full knowledge of all the facts, such conduct amounts to a waiver of the condition so as to preclude the lessor from afterwards availing himself of the forfeiture. Goodright v. Davids, 2 Cowp. 803; Wood, Landl. & Ten. 530, and notes. Manifestly, the same rule should apply to the covenant now under consideration. And here, as the evidence tends to show, the lessees applied to their lessor to put in some stairs, so as to give access to the basement of the demised premises, and their lessor replied that he would not be to the expense of putting them in, but that the lessees might do it, and for that purpose might use the old stairs which were then in the basement, and that they thereupon made the necessary opening in the floor, and put in the stairs designated by the lessor. These facts show a clear intention on the part of the plaintiff to waive his right of forfeiture growing out of the alteration in the premises thus authorized by him, and we see no reason why he should not be held to such waiver. There is no question, so far as we can see, of any variation or abrogation of the sealed instrument, but merely a waiver by the plaintiff of his right to declare a forfeiture thereunder. In fact, the case would seem to be an appropriate one for an application of the doctrine of estoppel. The plaintiff having by his words and conduct caused the lessees to believe that he would not enforce the forfeiture provided for in the lease, and they, with that belief, having made the alterations in question, he ought equitably to be estopped from seeking now to avail himself of the forfeiture. We are of the opinion that there was no error in the instruction, and, there being no other errors pointed out which seem to us to be worthy of consideration, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

DUMPOR'S CASE.

2 *Coke*, 119, 1 *Smith's Leading Cases*, 85. (1603)

In trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the President and Scholars of the College of Corpus Christi, in Oxford, made a lease for years in anno 10 Eliz. of the land now in question, to one Bolde, *proviso* that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors by their deed, anno 13 Eliz., licensed the lessee to alien, or demise the land, or any part of it, to any person or persons *quibuscunque*. And afterwards, anno 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought: and that upon the lease made to Bolde, the yearly rent of 33s. 4d. was reserved, and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved; 1st. That the alienation by license to Tubbe, had determined the condition, so that no alienation which he might afterwards make could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain, subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessees' assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest shall be

subject to the first condition: and as the dispensation of one alienation is the dispensation of all other, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256, in com. Banco inter Leeds, and Compton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two aliened without license, and it was adjudged, that in this case the condition being determined as to one person (by the license of the lessor) was determined in all. And Popham Chief Justice, denied the case in 16 Eliz., Dyer 334; that if a man leases land upon condition that he shall not alien the land, or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or apportioned by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for, although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by license, and, therefore, the condition being determined in part, is determined in all. And therefore the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota*, reader, Paschae 14 Eliz. Rot. 1015, in Com. Banco, that where the lease was made by deed indented for twenty-one years of three manors, A., B., C., rendering rent, for A. 6*£*, for B. 5*£*, for C. 10*£*, to be paid in a place out of the land, with a condition of re-entry into all the three manors; for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one and his heirs, and afterwards, by another deed indented and enrolled, bargained and sold all the residue to another and his heirs, and if the second bargainee should enter for the condition broken or not, was the question: and it was adjudged, that he should not enter for the condition broken, because the condition being entire, could not be apportioned by the act of the parties, but by the severance of part of the reversion is destroyed in all. But it was agreed, that a condition may be apportioned in two cases. 1. By act in law. 2. By act and wrong of the lessee. By act in law, as if a man seised of two acres the one in fee, and the other in borough English, has issue two sons, and leases both acres

for life or years, rendering rent with condition, the lessor dies, in this case, by this descent, which is an act in law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee; and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created, and that he cannot have, when he has departed with the reversion of part: and with that reason agrees Litt. 8ob. And vide 4 & 5 Ph. & Mar. Dyer, 152, where a proviso in an indenture of lease was, that the lessee, his executors or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without license, for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10, and 18 Eliz. cap 11, concerning leases made by Deans and Chapters, Colleges, and other ecclesiastical persons are general laws whereof the court ought to take knowledge, although they are not found by the jurors, and so it was resolved between Claypole and Carter, in a writ of error in the King's Bench.

See comment on this case, Tiffany, Real Property, p. 176.

Note: As to Estates on Special Limitation see *Brattle Square Church v. Grant*, *Infra*; *First Universalist Society v. Boland*, *Infra*.

CHAPTER IX.

EQUITABLE ESTATES.

- Section 1. Uses.
- Section 2. Trusts.
- Section 3. Equitable Conversion.

SEC. 1. USES.

WEBSTER v. COOPER.

14 Howard (U. S.) 488; 14 L. Ed. 510. (1852)

MR. JUSTICE CURTIS delivered the opinion of the court.

Henry Webster, an alien, and subject of Great Britain, brought his writ of entry in the Circuit Court of the United States for the District of Maine, to recover possession of, a parcel of land described in the count. He claims title under a will of Florentius Vassall. At the trial, the parties agreed on the following facts:

"It is agreed, by the parties, that the following statement of facts is true, namely, that the demanded premises belonged to the proprietors of the Kennebec Purchase, and were by them duly granted and assigned to Florentius Vassall, one of the proprietors in fee, in the year 1756, being included in the grant recorded in the records of the proprietary.

"That Florentius Vassall made his will September 20th, 1777, and died at London, 1778, seised of the lands in question, they then being unoccupied wild lands. The will was afterwards duly proved in the Prerogative Court of Canterbury, September 14, 1778, a copy of which will, with its exemplifications, has been duly filed and recorded in the Probate Office for the county of Kennebec; which will was offered in evidence, as copied, and makes a part of this case.

"Richard Vassall, named in the will died about 1795, leaving only one child, Elizabeth Vassall, who married Sir Godfrey Webster, deceased, about the first day of January, 1793, by whom she had issue, two sons, namely, Sir Godfrey Vassall Webster, who

died in the lifetime of said Elizabeth, without issue, and Henry Webster, the demandant. Said Elizabeth, afterwards, namely, in January, 1796, was legally divorced from her husband, the said Sir Godfrey Webster, and on the first day of July, 1797, she was legally joined in marriage with Richard Henry Fox, afterwards Lord Holland, by whom she had issue, one son, Henry Edward Fox, who is now living. All charges upon the land devised have been satisfied, and they are not now subject to any life estate, estate for years, or outstanding terms, under the will. Said Lord Holland died on the.....1841; said Lady Holland died in the fall of the year 1845. The persons named in said will as devisees in remainder, after the failure of the issue of said Elizabeth, or their lineal descendants, are now living in England, as is the said Henry Edward Fox, son of said Elizabeth. That said Florentius Vassall, was, at the time of said grant, a resident in Boston, State of Massachusetts; that he, on or before the year 1775, left his said residence, went to England, and never returned; and that neither he, nor any of the devisees named in said will, have ever resided within the limits of the United States since that time. The premises demanded, being the matter in dispute, are of greater value than two thousand dollars.

"The tenant, and those from whom he legally derives title to said demanded premises, have been in the quiet, undisturbed, open, notorious, and exclusive possession and occupation of said premises for and during the term of fifty years next preceding the commencement of this action, he and they claiming to hold the same adversely to any claim of said demandant, or any other person, as his and their own property in fee-simple."

These facts, together with the will of Florentius Vassall, made the case. By this will the testator devised three plantations in Jamaica, and all his lands in New England, (which included the demanded premises,) to Lord Falmouth, Lord Barrington, and Mr. Charles Spooner, and their heirs, to the uses, upon the trusts, and for the intents and purposes, and with and subject to the powers and provisos therein expressed. The will then proceeds to declare, in respect to all the lands in New England, as follows: To the use of my son, Richard Vassall, for and during his life, and from and after the determination of that estate by forfeiture, or otherwise, during his life, to the use of the three trustees during the life of Richard Vassall, in trust to preserve the contingent uses and estates thereafter mentioned, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit Richard Vassall

to take the rents of the premises to his own use during his life. The testator then declares the remainder, after the death of Richard to be to the use of the son and sons of Richard, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, and to the several and respective heirs male of the bodies of such sons, with cross remainders among them; and in default of such issue male of Richard, subject to a term of years, which it is agreed is not outstanding, to the use of Elizabeth Vassall, the daughter of Richard, for her life, with remainder as before stated to the trustees for the life of Elizabeth to preserve contingent remainders, in case of forfeiture of her life estate; and then follows the provision under which the demandant claims title, which is therefore given in the words of the will. "And from and immediately after the decease of the said Elizabeth Vassall, to the one or all and every the son and sons of the said Elizabeth Vassall, to be begotten, to be divided between or amongst such sons, if more than one, share and share alike, and they to take as tenants in common, and not as joint tenants, and the several and respective heirs male of the body and bodies of all and every such son and sons issuing." Then follow remainders to the other daughters of Richard, as tenants in common in tail general, will cross remainders; remainder to the daughters of Elizabeth Vassall, as tenants in common in tail general, with cross remainders,—with successive remainders to George and Richard, and William Barrington, testator's grandsons, for life; remainder to their sons, as tenants in common in tail male; remainder to testator's granddaughter, Louisa Barrington, for life, and her sons in common in tail male; remainder to her daughters, as tenants in common in tail general; remainder to testator's daughter, Elizabeth Barrington, for life; remainder to her other sons "in tail male successively;" remainder to her future daughters, as tenants in common in tail; remainder to testator's nephew May, for life; remainder to his sons in common in tail male; remainder to his daughters in common in tail; remainder to the minister and wardens of Westmoreland, &c.

These are the most material provisions of the will of these lands, and are sufficient to show its general structure, in reference to the questions which have been made concerning its legal effect.

The first of these questions is, whether, by force of the will, the demandant took any, and if any, what legal estate in these lands on the decease of his mother, Elizabeth Vassall.

It is insisted, by the tenant's counsel, that the trustees took the

legal estate in fee simple, and that the estate limited to Richard Vassall for life, and to the others, by way of remainder, were only equitable estates, and consequently the demandant cannot maintain this action.

But whether we look to the evident intent of the testator, or to the settled technical meaning of the language he has employed, we think it clearly appears that the life estate of Richard Vassall and the contingent remainders limited thereon were legal estates and that the trustees did not hold the fee-simple under this will. The instrument was drawn in England, evidently by a skilful draughtsman, and is in strict conformity with well-known precedents. It employs technical language with accuracy, and all the various provisions of the will, though numerous and complicated, compared with the usually simple testamentary dispositions of property in this country, are capable of being clearly understood and fully executed. The substance of the devises of these lands, may be stated to be: to the trustees and their heirs to the use of Richard for life, remainder, for his life in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common in tail, with cross remainders; remainder to Richard's daughter Elizabeth for life; remainder to trustees to preserve contingent remainders during her life; remainder to the sons of Elizabeth in tail, the demandant being the elder of her two sons.

A devise to the trustees and their heirs to the uses mentioned, carries the legal estate to the *cestuis que use*, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate exactly commensurate with the exigencies of their trust. *Morrant v. Gough*, 7 B. & C. 206; *Kenrick v. Lord Beauclerk*, 3 B. & P. 178; 10 Bythewood on Con. 214; *Jarm. on Wills*, 198-9; *Nielson v. Lagow*, 12 How. 110, 111; 1 *Greenl. Cruise*, 346-7, note.

The testator has not imposed on the trustees any duties, connected with these lands, which in any way interfere with the existence of legal estates in the different beneficiaries named in the will. On the contrary, the sole duties to be performed by them, in reference to these lands, are to take the life estates, in case of forfeiture, and hold them, so that the future remaindermen may not be deprived of the legal estates limited to them by way of contingent remainders, which require the preservation of the particular estates to support them.

Whether the trustees took and held any legal estates in either of

the plantations in Jamaica, it is not necessary to determine. It was argued that they did, because they have some duties to perform concerning two of them, and that the testator employs the same language in devising these two plantations to the trustees, as he does in devising the lands in New England. But it by no means follows that the same words devising to trustees two parcels of land, must necessarily vest the legal estates in both parcels in the trustees, because they take a legal estate in one of those parcels. They may take a legal estate in one, because subsequent parts of the will require them to do acts in reference to it, which can be done only by the holder of the legal estate, and then the law assigns to them such an estate as the due execution of their trust demands; while at the same time, by force of the statute of uses, or of wills, the other land, as to which no duties are required of the trustees, goes to the *cestuis que use*.

So far as this will operates on the lands in New England, there is nothing to prevent the usual and settled operation of a devise to uses, which is, to vest the legal estate in the *cestuis que use*; and it is placed beyond all doubt that it was not intended the trustees should hold the fee, because there are express limitations of life estates to them to preserve contingent remainders, which would be wholly inoperative if they took the fee, and is sufficient of itself to control any doubtful intent, according to *Doe v. Hicks*, 7 T. R. 433; *Curtis v. Price*, 12 Ves. 100.

Our conclusion is that the legal estates in the New England lands, were to go to the beneficiaries named in the will.

It is further urged by the tenant's counsel, that the legal effect of the devise to Elizabeth Vassall for life, remainder to her sons, as tenants in common, share and share alike, and to the heirs of their bodies, gave an estate tail to Elizabeth Vassall, under the rule in *Shelly's case*, which was in force in Massachusetts, within whose limits these lands lay at the time this will took effect. There is no doubt this rule made part of the law of Massachusetts until the 8th of March, 1792, when it was abolished by statute, so far as it respects wills. *Bowers v. Porter*, 4 Pick. 198; *Steel v. Cook*, 1 Met. 282. But in our opinion, the rule in *Shelly's case* is not applicable to this devise. That rule is, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately, to his heirs in fee or in tail, that the words heirs, &c., are words of limitation, and not of purchase.

Here the life estate is limited to Elizabeth Vassall, and the remainder to her sons as tenants in common, share and share alike, and the heirs of their bodies. The fee tail is not limited to the heirs in tail of the first taker. The heir in tail was this demandant; and the remainder is not limited to him, but to him and his brother, as tenants in common. It is not a question, therefore, whether the same persons shall take by descent or purchase, which alone is the matter determined by the rule in Shelly's case; for the two sons could not take an estate tail from their mother as tenants in common. They must take as purchasers, or not take at all; and there is no rule of law which forbids such a devise, nor can the rule in Shelly's case be applied to it. On the contrary, it is well settled that a limitation by way of remainder to the sons of the first taker, as tenants in common, manifest the intent of the testator that the ancestor should not take an estate in fee or in tail, and that the sons may and do take as purchasers. *Doe v. Burnsall*, 6 T. R. 30; *Burnsall v. Davy*, 1 B. & P. 215; *Gilman v. Elvy*, 4 East, 313, *Doe v. Collins*, 4 T. R. 294; 4 Greenl. Cruise, 389.

Our opinion is, that upon the decease of his mother, this demandant took, as a purchaser, an estate tail in one moiety of these lands, as a tenant in common with his brother. * * *

KAY v. SCATES.

37 Pa. St. 31; 78 Am. Dec. 399. (1860)

Bill in equity by J. Alfred Kay, William H. Furness, jun., and Hannah, his wife (formerly Hannah Kay), and Mary Kay, against Charles W. Scates and Edward R. Cope, executors under the will of James Kay, deceased. By his will, James Kay, devised one-third of his estate to each of the complainants for life, with a power of appointment in favor of the issue of their bodies, and in default of such appointment, then to such issue, and in default of any issue, to the testator's heirs at law by consanguinity, directing the same to be held in trust by the defendants. In regard to Hannah Furness and Mary Kay, the object of the trust purported to be to prevent their interest in the estate from becoming liable for any debts or engagements, or subject to the control of any husband they might have or take; and it was directed, in the case of each of the complain-

ants, that he or she should be entitled to the income of the estate so devised on attaining the age of twenty-six years. J. Alfred Kay is alleged to be twenty-five years of age, Hannah Furness, twenty-two, and Mary Kay, twenty-one. The prayer of the bill is for a decree to compel defendants to convey the legal title to real estate in which the funds of the estate had been invested to the complainants in equal portions.

STRONG, J. If the estate devised for life to J. Alfred Kay and the other complainants be only equitable, while the remainder given to the issue of the bodies of each is legal, the prayer of the bill must be denied. There is, then, no ground for the application of the rule in *Shelly's* case. The first question, therefore, presented by the record is whether the legal estate is vested in the defendants, who are the trustees named in the will of the testator, or whether it has passed to the beneficial devisees. The will directs that the trustees shall invest the property given in real estate in their own names, which has been done. It directs that the property shall be kept perpetually and sufficiently insured, and that, on the attainment of the age of twenty-five years by James Alfred Kay, the trustees shall pay to him, during his life, in quarterly installments, the income of the said real estate purchased for his benefit; and it declares that his receipt, and his receipt alone, shall be their only sufficient discharge therefor. James Alfred Kay, one of the complainants, has attained the age of twenty-five. As to him, the discretion given to the defendants to allow to each of the complainants, from his or her income, such money for his or her support and education as they may think proper and expedient, and the direction to invest the surplus for his benefit, have expired. The duty of the trustees now, therefore, is to pay over, quarterly, the whole income, taking his receipt. Have they, then, any duty imposed upon them which requires that they should continue invested with the legal estate? If the case were to be decided according to the doctrine of the English courts, it cannot be doubted that they have. There the rule appears to be well established, that when there is a gift of real estate to trustee, with a direction to convey, or to pay the rents and profits to certain persons, or to receive the rents and apply them for the maintenance of an individual during his life, or to pay an annuity out of the rents during his life, the seisin or possession of the legal estate is requisite for the due performance of the duty imposed upon the trustees, and consequently that the persons to whom the use is subsequently given take only an equitable estate.

Such interests are not held regarded as mere dry trusts, to be disregarded, and considered executed in the person to whom the beneficial interest is given. To sustain a dry trust, there must have been some special lawful trust expressed, but not so where the trustee has active duties to perform. From the case of Lord Say and Seal v. Jones, 1 Eq. Cas. Abr. 383, to the present time it has been held that there is a distinction between a devise to trustees to pay the rents, issues, and profits, and a devise to them to permit the beneficial donee to receive such rents, or generally in trust for the beneficial donee. Hill, in his treatise on trustees, has collected many cases in which the doctrine has been asserted (p. 232). Jarman also has collected a large number, from which he deduces the rule that where property is devised to A and his heirs, the question whether A does or does not take the legal estate depends chiefly on the fact whether the testator has imposed upon him any duty or trust, the performance of which requires that the estate should be vested in him; and it has been held, and is still held, that though nothing be required of the trustee but to pay over the rents, that is sufficient. Thus in Leicester v. Biggs, 2 Taunt. 109, a distinction was drawn between a devise to a trustee to pay over the rents, and a devise to permit the *cestui que trust* to receive them; the legal estate in the former case being held to be in the trustee, and in the latter in the beneficial owner. In Gratetz v. Homfray, 6 Ad. & El. 206, there was a devise to the use, that certain persons named should and might take and receive the rents, issues, and profits, and pay the same to the testator's son for and during his natural life, and from and after the decease of the son, the testator devised the premises to the heirs of the body of the son, with remainders over in default of such heirs of the body. It was held that a legal estate passed to the persons empowered to receive and pay the rents during the life of the son. Lord Denman said the case fell within the numerous class where it has been held that a devise to trustees to pay over the rents vests the estate in such trustees. That the devise is not directly to the trustees, but to the use and intent that they may receive, etc., appears to us to make no difference, nor the absence of a devise to trustees to preserve contingent remainders. He added, "it was observed that the will required nothing to be done by the trustees, and it is true nothing is to be done but paying; but this has been held to be sufficient, and must be taken to be the present law." And even where a trust to permit and suffer the testator's wife to receive the rents during her widowhood was followed by a direction that her

receipts with the approbation of any one of the trustees should be good and valid, it was held that the legal estate was vested in the trustees, and this because the testator contemplated that they should approve the receipts given by the *cestui que trust*.

Neither in England nor in this state will a mere dry trust be sustained, where the person equitably entitled to any property takes absolutely the entire beneficial interest, and the trustee has no duty to perform, unless it be a special trust, intended to accomplish some object, such as to preserve contingent remainders, or to protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*. But some recent Pennsylvania cases have held that our law strikes down trusts which are valid in England, treats them as executed, and regards the legal estate as vested in the *cestui que trust*. Of this class, *Kuhn v. Newman*, 2 Casey 227, is the leading one, and perhaps the first. *Rush v. Lewis*, 9 Harris 72, and *Steady v. Rice*, 3 Casey 75 (67 Am. Dec. 447), are in perfect harmony with the decisions in the mother country. In the first of these there was a devise to executors in trust to pay the rents, issues, and profits to the testator's daughter, during her life, for her sole and separate use, and after her death for the use of such persons as she might appoint by will, and in default of appointment, to and for the use of her children. After the death of the daughter, the legal estate was held to be vested in her appointee. Here, after the termination of the special trust, to pay the rents to the sole and separate use of the married daughter, there were no duties for the trustees to perform, and the purposes of the trust were satisfied. Then the law struck it down. Indeed, it was intimated that the direction to pay the rents, issues, and profits to the tenant for life alone sustained the legal title in the trustees till her death, though the intimation overlooked the fact that there was a special purpose in the creation of the trust, to wit, the preservation of the income for the separate use of a married woman. *Steady v. Rice*, *supra*, was very similar. There also the legal estate was not declared vested in the *cestui que trust* until the special trust had terminated, and the trustees had ceased to have any active duties to perform.

But *Kuhn v. Newman*, *supra*, advances on the doctrine of these cases. There, the trust was to hold for the separate use of the *feme covert* to permit her to take, receive, enjoy, expend, and dispose of the rents, issues, and profits, during her natural life, and after her death, in trust to educate, maintain, and support her children until their arrival, respectively, at the age of twenty-one years, then

in trust for the sole and separate use of such children, subject as to income thereof to their own free and absolute disposal. Until the children arrived at the age of twenty-one, the trustees were required to educate, maintain, and support them; after that time they had no duties to perform; and even in England, the legal estate would then have vested in them. But the court held that it so vested, even before their arrival at the age of twenty-one, notwithstanding the duty imposed upon the trustees. They declared that "our common law takes a higher position than English common law or English equity; that in relation to titles to lands, it does so by adopting the forms of both as legal forms, and treating all complete equitable titles as complete legal ones, where the persons named as trustees have no duty to perform that requires the seisin and possession to be in them; and then our common law enforces the trust as a legal estate," "even those uses that were not executed by the statute (of uses); for example, those that are limited against the rules of the common law: Chudleigh's Case, 1 Co. 129; a use limited upon a use, a use of chattels real, and a trust to receive rents and pay them to another: 2 Bla. Com. 335; all these are executed by one principal." The case, in effect, denies the possibility of creating in this state any other than technically special trusts. Thus it is said that trusts properly so called are uses that our law does not execute as legal estates, because of circumstances that take them out of the ordinary course of legal administration and place them under a special guardianship of the court; but this is not generally allowed in favor of individual persons who have full competency to act in their own right. A fee-simple in them is treated as such, whether assured in a legal or equitable form. In other words, persons who are *sui juris* men or women must be satisfied with the ordinary remedies and protection of the law. And finally, it is held that a trust to educate and maintain children until they arrive at age does not furnish a legitimate reason for preserving the trust from being executed in the beneficiary. The case was decided by a unanimous court. I understand it as denying the possible existence of any such trust as the testator in this case has attempted to set up in favor of the complainants. It declares them to be the holders of the legal estate. Bush's Appeal, 33 Pa. St. 85, substantially reasserts the doctrine of Kuhn v. Newman. There, the *cestui que trust* was a *feme covert*, it is true, but the gift was not declared to be for her separate use. The trustee was ordered to receive the legacy, put it at interest, and pay the interest yearly to the testator's daughter during her natural life, and the

principal, after her death, to her heirs, share and share alike, in equal parts. The trustee's duty, it will be observed, was to invest and pay the interest yearly during life.

This court held that no trust existed after the death of her husband. The actual duties imposed upon the trustee were not sufficient to keep alive the trust, and it was therefore treated as executed in the *cestui que trust*. Kuhn v. Newman, *supra*, and Bush's Appeal, *supra*, govern the present case. The complainants are all *sui juris*. The duties imposed upon the respondents, as trustees, are neither greater, nor more require the seisin to remain in them, than the duties of the trustees in those cases. Nor is the nature of the duties different. The trustees are to pay the income quarterly, and are to be discharged only by the receipts of the complainants. The entire beneficial interest is in the *cestuis que trust*. It is true that two of the complainants have not yet arrived at the age of twenty-five, and until then the testator has postponed their full enjoyment of the income of the property. Until then a discretion is given to the trustees to determine what amount they shall receive. The full right to a present beneficial enjoyment is not yet theirs. But when they shall reach that age, they will stand in the same position with their brother, the other complainant. It need not be said that a trust is to be sustained because the gift is for their sole and separate use. They were unmarried when the will took effect, and no marriage was immediately contemplated: Smith v. Starr, 3 Whart. 67 (31 Am. Dec. 498). But the right of the respondents to control the amount which they may enjoy until they reach the age of twenty-five will postpone the execution of the trust until that time. The trust could not be discharged under the direction of the orphans' court after they arrive at majority, and therefore there is a reason for its continuance that did not exist in Kuhn v. Newman, 26 Pa. St. 227. But J. Alfred Kay has attained to the age of twenty-five when, by the directions of the will, the whole of the income of the property devised is to be paid to him. Under the rule asserted in Kuhn v. Newman, *supra*, and Bush's Appeal, *supra*, his has therefore become a legal estate, as is the remainder limited after his decease. Considering, then, both the particular estate for life and the remainder as legal, the limitations of the will are to J. Alfred Kay for life, with a power of appointing among any of the issue of his body, and in default of appointment, to such issue; and if he die leaving no issue of his body, then over. * * *

It follows that J. Alfred Kay is the legal owner in fee-simple,

of one-third of the property, and that the other complainants will be similar owners when they shall respectively attain the age of twenty-five. No decree is at the present asked in favor of any other complainant than J. Alfred Kay, and we shall therefore only decree a conveyance to him.

In *Rush v. Lewis*, 9 Harris, 72, and in *Kuhn v. Newman*, *supra*, this court refused to decree a conveyance from the nominal trustee, in cases where the legal estate was held to be executed in the *cestui que trust* by force of law, on the ground that there was no necessity for it. Yet the nominal trust beclouds the title and embarrasses the rights of alienation which belong to the true owner. We think it better, therefore, to decree a conveyance, and such is the practice of courts of chancery, where the purposes of a trust once existing have been accomplished.

Decree reversed.

Note: There is a well prepared note upon the Statute of Uses in 78 Am. Dec. 406.

SULLIVAN ET AL. v. CHAMBERS ET AL.

18 R. I. 799; 31 Atl. 167. (1895)

Per Curiam. We are of the opinion that the deed from the Mechanics' Savings Bank to Isabella Chambers, Margaret Chambers, trustee, is to be construed as a deed to Margaret Chambers as trustee for Isabella Chambers, and that, there being no duties required of the trustee by the terms of the conveyance, the title to the real estate described in the deed vested, under the statute of uses, on the delivery of the deed in the said Isabella. The subsequent partition deed, dated October 6, 1883, between Bessie C. Bowen, William A. Tucker, and Holden B. Bowen, trustees, and the said Isabella Chambers, Margaret Chambers, trustee, was duly executed by Isabella, though from the form in which the certificate of acknowledgment is written it is impossible to determine whether it was acknowledged by her or by Margaret Chambers, trustee, who also executed the deed. This being the condition of the title as disclosed by the record, all that is necessary to cure the defect is the acknowledgment or reacknowledgment of the partition deed by said Isabella. This can be obtained

by the complainants, if she refuses to make it voluntary, under the provisions of Pub. St. R. I. c. 173, §§ 6, 7. We see no occasion, therefore, for the relief prayed by the bill.

URE v. URE ET AL.

185 Ill. 216; 56 N. E. 1087. (1900)

Boggs, J. The chancellor entered the decree here appealed from on the theory that the trust created by the second clause of the will of Margaret Ure, deceased, was a passive or dry trust, and that the statute of uses instantly operated to vest the legal title to the real estate in the *cestui que trust*. Whether such is the true construction of the clause is the only question presented by the record. The clause reads as follows: "Second. After the payment of such funeral expenses and debts, I give, devise, and bequeath to my son John Francis Ure all my cows, bulls, and calves, except one cow and my horses Rosy, Jessie, and Doll, and the remainder of my real and personal estate equally to my two sons, Robert Arnold Ure and John Francis Ure: provided, however, that the portion of my estate that I hereby give, devise, and bequeath to my son Robert Arnold Ure shall be held by a trustee, and said trustee to be the executor of this my will, hereinafter named, to hold and control said property for said Robert Arnold Ure in trust; he, the said Robert Arnold Ure, to have the income, only, from said estate to his own use and benefit as long as he may live, and on his death said estate to revert to his natural heirs," etc. The trust estate, as appears from the will, consisted of both real and personal property. The statute of uses has no application to personal property, and the title to that portion of the trust property was not affected by that statute. 27 Am. & Eng. Enc. Law, p. 111, and cases cited in note 1; 3 Jarm. Wills, p. 51, note 2. Speaking of the rule of construction adopted in some instances when a trust estate consists in part of property, the fee whereof necessarily vests in the trustee, it is said in 3 Jarm. Wills (5th Am. Ed.) p. 85: "It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustee to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustee for the whole of the testator's interest affords a ground for giving the will the same construction as to the estate in question."

The income of the estate, both personal and real, is bequeathed to said Robert Arnold Ure during his lifetime, and the remainder in fee devised to his "natural heirs." The trustee is empowered to "hold and control" the property in trust, etc., and these words measure and fix the duties of the trustee. The word "hold," which was a technical word as employed formerly in the *tenendum* clause of a deed, has now no technical meaning when used in such instruments. Bouv. Law Dict. "*Tenendum*"; Wheeler v. Wayne Co., 132 Ill. 599, 24 N. E. 625. Among others, the following definitions of the word "hold" are given by Mr. Webster: "To derive title to; to retain in one's keeping; to be in possession of; to occupy; to maintain authority over." The word "control" has no legal or technical meaning distinct from that given in its popular acceptation. Webster employs the word "superintendence" as expressive of the meaning of the word "control," and gives the word "control" as one of the synonyms of the word "superintendence." The same lexicographer defines the word "superintendence" as follows: "The act of superintending; care and oversight for the purpose of direction and with authority to direct." The word "manage" is defined to mean "to direct; control; govern; administer; oversee." And. Law Dict. And the words "control" and "manage" have been held to be synonymous. Youngsworth v. Jewell, 15 Nev. 48. Power to hold and the duty to control the trust estate involve the custody and possession of the trust property, both real and personal, and such a trust is not merely passive. It is not indispensable to the power and duty of a trustee to rent the trust property and collect the rent thereon, that the devise shall in express terms so empower him. It is enough if the intent to invest him with such power can be gathered from the will. 3 Jarm. Wills (5th Am. Ed.) p. 56. It was manifestly the intention of the maker of the will here under consideration that the executor, as trustee, should enter into and retain possession of the trust estate, during the lifetime of the said Robert Arnold Ure, and should diligently devote his energy, judgment, and discretion to the management and control of the property, to the end that the greatest possible income should be secured therefrom. The statute of uses does not execute a trust of this character. Meacham v. Steele, 93 Ill. 135; Kirkland v. Cox, 94 Ill. 400; Kellogg v. Hale, 108 Ill. 164. The decree must be reversed, and the cause will be remanded for further proceedings in accordance with the views here expressed.

Reversed and remanded.

BOWEN v. CHASE.

94 U. S. 812; 24 L. Ed. 184. (1876)

MR. JUSTICE BRADLEY delivered the opinion of the court.

* * * Stephen Jumel was the owner of a lot at the corner of Broadway and Liberty Streets, and of several tracts of land on Harlem Heights, in the upper part of New York City. In 1827 and 1828, by certain mesne conveyances, the greater portion of this property was conveyed to one Michael Werckmeister upon the following trusts, namely:

"In trust that the said party of the second part (Werckmeister) and his heirs collect and receive the rents, issues, and profits of the said above-described and hereby-conveyed premises, and every part and parcel thereof, and pay over the same unto Eliza Brown Jumel (the wife of Stephen Jumel, late of the city of New York, now of Paris, in France) or, at her election, suffer or permit her to use, occupy, and possess the said premises, and to have, take, collect, receive, and enjoy the rents and profits thereof, to and for her own separate use and benefit, and to and for such other uses and purposes as the said Eliza Brown Jumel shall please and think fit, at her own free will and pleasure, and not subject to the control or interference of her present or any future husband, and the receipt and receipts of her, the said Eliza Brown Jumel, shall at all times be good and sufficient discharges for such payments, and for such rents and profits to him, the said party of the second part, his heirs, executors, and administrators, and to the person or persons who are or shall be liable to pay the same; and upon this further trust, that the said party of the second part or his heirs lease, demise, let, convey, assure, and dispose of all and singular the said above-described premises, with their and every of their appurtenances, to such person or persons, for such term or terms, on such rent or rents, for such price or prices, at such time or times, to such uses, intents, or purposes, and in such manner and form, as she, the said Eliza Brown Jumel, notwithstanding her present or any future coverture, as if she were a *feme sole*, shall, by any instrument in writing, executed in the presence of any two credible witnesses, order, direct, limit, or appoint; and in case of an absolute sale of said premises, or of any part thereof, to pay over the purchase-money to the said Eliza Brown Jumel, or invest the same as she shall order and direct;

and upon this further trust, upon the decease of the said Eliza Brown Jumel, to convey the said above-described premises, or such parts thereof as shall not have been previously conveyed by the said party of the second part, or his heirs, and with respect to which no direction or appointment shall be made by the said Eliza Brown Jumel in her lifetime, to the heirs of said Eliza Brown Jumel in fee-simple; and pay over to the heirs of the said Eliza Brown Jumel such moneys as shall remain in the hands or under the control of the said party of the second part or his heirs, arising from collections of the rents and profits, or of the proceeds of the sales of the above-described premises, or any part thereof."

On the twenty-first day of November, 1828, the said Eliza Brown Jumel, by a deed duly executed as required by the trust, made an appointment of all the lands conveyed in trust, in the following terms, to wit:

"Now, I, the said Eliza Brown Jumel, do hereby direct, order, limit, and appoint, that, immediately after my demise, the said Michael Werckmeister, or his heirs, convey all and singular the said above-described premises to such person or persons, and to such uses and purposes, as I, the said Eliza Brown Jumel, shall by my last will and testament, under my hand, and executed in the presence of two or more witnesses, designate and appoint; and for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon during his said natural life, of six hundred dollars, payable to Mary Jumel Bownes, and after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her the said Mary Jumel Bownes, and her heirs in fee."

It is on this trust and appointment that the appellees rely as the foundation of their title to what is generally known as the Stephen Jumel estate. Mary Jumel Bownes, the appointee of the residuary estate, was the adopted daughter or protegee of Stephen Jumel and Madame Jumel his wife, and the reputed niece of the latter. In 1832, Mary Jumel Bownes, became the wife of Nelson Chase, and had by him two children, Eliza Jumel Pery and William I. Chase, appellees in this case. She died in 1843, leaving these children her sole heirs-at-law, in virtue of which they claim title to the estate.

The appellant claims to be an illegitimate son of Madame Jumel, born in 1794, before her marriage with Stephen Jumel; and by virtue of that relationship, and of a statute of New York, passed in

1855, enabling illegitimate children to inherit from their mother, he claims to be her sole heir-at-law. He resists on various grounds, the claim of Mrs. Chase, and her heirs under the appointment. First, he contends that Madame Jumel took a legal estate in fee-simple by virtue of the trust-deed. But if not, then he contends, secondly, that by certain conveyances and appointments made by Madame Jumel, under the powers contained in the trust deed, the appointment in favor of Mrs. Chase was displaced, and superseded by other estates which inured to Madame Jumel.

The conveyances and appointments referred to under the second head are the following:

First. A conveyance to Alexander Hamilton by Werckmeister, the trustee, at the request and by the appointment of Madame Jumel, dated the tenth day of January, 1834, of ninety-four acres of land at Harlem Heights, for the expressed consideration of \$15,000. On the twenty-first day of October, in the same year, this property was reconveyed by Hamilton to the trustee, upon the same trusts declared in the original deed of trust.

Secondly. A conveyance by the trustee, at the instance and appointment of Madame Jumel, made on the twentieth day of August, 1842, to one Francis Phillippon, of a large portion of the estate, for the expressed consideration of \$100,000; and a reconveyance of the same property, on the same day, by Phillippon to Madame Jumel in fee, for the expressed consideration of one dollar.

Besides these conveyances, in 1850, a lot of thirty-nine acres, being part of the property on Harlem Heights, was sold and conveyed to Ambrose W. Kingsland; and, in 1853, another lot of three acres, to Isaac P. Martin: which conveyances are admitted to have been made to actual purchasers for valuable consideration.

The effect of these various deeds and conveyances is now to be considered. And, first, that of the trust-deeds executed to Werckmeister in 1827 and 1828. There were two of these deeds, but the trusts in both were precisely the same.

The limitations of this trust are very clear and plain, being of a life-estate to the separate use of Eliza Brown Jumel (known as Madame Jumel), with a general power of appointment during her lifetime; and, on failure to make such appointment, to her heirs in fee-simple.

The counsel for the appellant contends that this trust amounted to a use of the lands, and that, under the old statute of uses and trusts, it operated to vest the legal estate in fee in Madame Jumel,

But we think that the authorities are very clear, that where a trust is thus created for the benefit of a married woman, for the purpose of giving her the separate use and control of lands free from the control of her husband, it will be sustained; since to merge the trust in the legal estate, or, to speak more properly, to convert it into a legal estate, would have the effect of placing the property in the husband's control by virtue of his marital rights, and would thus defeat the very purpose of the trust. *Harton v. Harton*, 7 T. R. 653; *Cornish on Uses*, 59 sect. 6; *Rife v. George*, 59 Penn. 393.¹

The legal effect of the appointment made by Madame Jumel, Nov. 21, 1828, we do not regard as any more doubtful than that of the trust. It was manifestly this, that, subject to Madame Jumel's right of disposing of the lands by will (which right she reserved), and after the termination of her separate interest for life, the equitable estate in the lands was limited to her husband for life, with remainder to Mary Jumel Bownes in fee-simple. This is so obvious as to require no elaboration of argument or discussion. The interests limited to Stephen Jumel for life, and to Mary Jumel Bownes in fee, were immediate vested interests, though to take effect in possession at a subsequent period; namely, at the death of Madame Jumel, and subject to be divested by her reserved power of disposing of the lands by will. The circumstance that the appointment in their favor is, in form, a direction to the trustee to convey to them, does not derogate from the vesting quality of their equitable interests in the meantime. The conveyance would be necessary for the purpose of clothing them with the legal estate. *Stanley v. Stanley*, 16 Ves. 507; *Phipps v. Ackers*, 9 Cl. & Fin. 594; 4 Kent's Com. 204; *Radford v. Willis*, L. R. 12 Eq. Cas. 110; L. R. 7 Ch. App. 11. * * *

The more material question is as to the effect of the conveyances made by Madame Jumel, and by the trustee in obedience to her direction and appointment subsequent to the death of her husband.

We may dismiss the notion which pervades the argument of the counsel for the appellees, that these conveyances were a fraud upon the appointment made in behalf of Mary Jumel Bownes (or Mrs. Chase). However proper that appointment may have been, considering the relations which the appointee sustained to Mr. Jumel and his wife, as their adopted daughter, it was, nevertheless, only a voluntary one; and the subsequent appointments can in no wise be regarded as frauds upon it. They were, or they were not, such ap-

¹ The remainder of the opinion relates to the power of appointment and may be more properly studied in connection with the Chapter on Powers.

pointments as Madame Jumel still had the power to make, and their effect is to be judged of by the nature of her power, and by that circumstance alone.

It is contended by the counsel for the appellant, that, where, several distinct powers are given in the same instrument, the execution of one of these powers superior in dignity to others will supersede and override the latter, though executed first. This is, to a certain extent, true, as shown and explained by Mr. Sugden in his work on Powers, in the passages referred to. The execution, for example, of a power of sale will supersede all other powers, for it must necessarily do so in order to have any effect. Mr. Sugden, in illustrating the rule, says:

"Thus, a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser, for example, a lessee; for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether any particular use was really contained in the original settlement, or was introduced into it in the view of the law by the execution of a power continued in it." 2 Sugd. on Powers, 47, 48 (6th ed.)

In the present case there was a power to lease, and a power to convey, assure, and dispose. That the latter power included a power to "sell" is not only manifest from the words but from a subsequent passage of the trust, which directs as to the disposition of the purchase-money "in case of an absolute sale." At the same time, the words are so general as to authorize a disposition in favor of a volunteer, or gratuitous beneficiary. Here, then, are really two distinct powers contained in one clause; and, according to the rules laid down by Mr. Sugden, the power to sell is the superior power, and will override the other power, and supersede it, if previously exercised.

This rule with regard to the relative priority and dignity of different powers in the same instrument, though depending on construction and the presumed intention of the donor, is somewhat analogous to the rule adopted by the courts in construing the act of 27 Elizabeth, respecting fraudulent conveyances. It has been invariably held under that act that a conveyance to a purchaser avoids all prior voluntary conveyances of the same lands; though, as between two voluntary conveyances, or two conveyances to purchasers, the first will take the precedency. Roberts on Fraud. Conv., pp. 33, 641. So, in regard to double powers, a power to sell or

exchange, when exercised, overrides all other distinct powers; for they are necessarily exclusive of all others; whereas the uses appointed under other powers may possibly be served out of the estate procured by the price of the sale, or by the exchange. But when a mere power to convey, as distinguished from a power to sell, is once executed in favor of a voluntary beneficiary, it cannot be revoked without reserving a power of revocation, and will not, therefore, be superseded by a subsequent conveyance equally voluntary, made under the same power.

Had the transactions in question been real and effective sales to actual purchasers for valuable consideration, they would undoubtedly have superseded the voluntary appointment in favor of Mary Jumel Bownes. The position of the appellees' counsel, that no subsequent appointment could displace this without having expressly reserved a power of revocation, cannot be maintained, for, as we have seen, a sale does have that effect. There is no doubt, therefore, that the conveyances to Kingsland and Martin were valid and effectual. And the execution of those conveyances cannot be characterized as in any manner fraudulent. They were conveyances which Madame Jumel, under her original power of appointment, had a right to make, notwithstanding the previous appointment in favor of her adopted daughter.

But the conveyances made to Hamilton and Phillippon were of a different character, and seem to have been intended merely as means of restoring the property to its original trusts, or of vesting it absolutely in Madame Jumel herself, freed from the said appointment. On this point there can be no dispute, so far as regards the deed to Phillippon. It was a mere formal conveyance, made to enable him to reconvey the property to Madame Jumel. As such it was simply voluntary, and could have no paramount effect over the previous appointment in favor of Mary Jumel Bownes.

The conveyance to Hamilton may admit of more doubt. But looking at the whole transaction, the conveyance and the reconveyance, we cannot avoid the conclusion that it was intended as a means of getting rid of the former appointment. The reconveyance by Hamilton to Werckmeister was equivalent to a cancellation of the pretended purchase. It was not a sale made by Hamilton to Werckmeister, nor a settlement made by him for any purposes of his own. It was simply a handing back of the property. In our judgment, therefore, the two conveyances amounted to a mere formal transfer and re-transfer; and, if any sale was ever intended, it was rescinded by the

mutual consent of the parties to it. We are of opinion that this transaction did not, any more than that with Phillippon, affect the appointment in question, or the estate of the appointee, whether that estate is to be regarded as a legal or an equitable one.

The next question is as to the title of the appellees to equitable relief for protecting them in the title which they have thus acquired. Madame Jumel died in 1865; and the appellees immediately entered into full possession of all the property in question, both that which was derived from Stephen Jumel and that which is conceded to have been the proper estate of Madame Jumel; and they have been in possession ever since. The appellant, by his several actions of ejectment, seeks to deprive them of that possession. With regard to the Stephen Jumel property, the title to which we have been considering, and which the appellees claim under and by virtue of the said trust and appointment, it is apparent that, if the estate which they thus acquired is to be regarded as still an equitable estate, their right to the protection of a court of equity is undoubted, no matter where, or in whom, the legal estate may be,—whether in the heirs of Werckmeister, the trustee, or in the heirs of Madame Jumel by virtue of the conveyances above referred to. On the other hand, if, by virtue of the Revised Statutes, the equitable estate of the appellees became converted into a legal estate, they would still have good cause to come into a court of equity for the purpose of removing the cloud upon their title created by the subsequent appointments and conveyances to Hamilton and Phillippon. These instruments on their face purport to be conveyances to purchasers, setting forth pecuniary considerations to a large amount, and, by themselves, would import such a disposition of the lands conveyed as would defeat the appointment made in favor of Mrs. Chase. It is only by bringing them into juxtaposition with the sequent transactions in each case respectively,—that is to say, by the introduction of supplemental evidence,—that they are shown to be ineffective. In view of these considerations, and of the fact that the whole title involves the true construction of the trust and the power of appointment, and the further fact that Madame Jumel was in full possession of the property, using and treating it as her own absolute estate until her death, the appellees were perfectly justified in coming into a court of equity to have these conveyances declared void and without effect.

To this extent we think they are entitled to a decree, including also a decree for a perpetual injunction against the appellant, prohibiting him from prosecuting any action or suit for the recovery of the

lands embraced in the appointment made in favor of Mary Jumel Bownes, by the deed of appointment executed by Eliza B. Jumel, and bearing date the twenty-first day of November, 1828. * * *

Decree reversed.

CROXALL v. SHERERD.

5 Wall. (U. S.) 268; 18 L. Ed. 572. (1866)

Robert Morris being seised of lands in fee simple, in the State of New Jersey, by an indenture conveyed them to Robert Morris, Jr., Adam Hoops and Aaron D. Woodruff, upon designated trusts, the *habendum* being:

"To have and to hold the said messuage, lands, &c., to the said Robert, Jr., Adam, and Aaron, their heirs and assigns, to the uses, trusts, intents, and purposes hereinafter mentioned, limited, expressed, and declared of and concerning the same; that is to say, to the use and behoof of the said Charles Croxall and his assigns, for and during the term of his natural life; and from and immediately after the decease of the said Charles to the use and behoof of the said Mary, his wife, and her assigns, for and during the term of her natural life, in case she shall happen to survive the said Charles; and from and after the determination of the said estates so limited to them, the said Charles and Mary, his wife, for their several and respective lives, to the use and behoof of the said Robert, Jr., Adam, and Aaron, and their heirs, for and during the lives of them, the said Charles and Mary, his wife, and the life of the longer liver of them, upon trust to preserve the contingent uses and remainders thereof, hereinafter limited; from being destroyed, and to and for that purpose to make entries as occasion shall require, but not to convert any of the profits of said premises to their own uses, but nevertheless in trust to permit and suffer the said Charles, and his assigns, during his natural life, and after his death, the said Mary, his wife, and her assigns, during her natural life, to receive and take the rents, issues, and profits of all and singular the said premises, with the appurtenances, to and for their respective uses and benefits; and from and immediately after the death of the survivor of them, the said Charles and Mary, his wife, then to the use and behoof of the heirs of the body of the said Mary, by her pres-

ent husband lawfully begotten, or to be begotten, and to the heirs of his, her, and their bodies lawfully to be begotten; and in default of such issue, then to the use and behoof of the said Robert Morris, party of the first part to these presents, and of his heirs and assigns forever, and to or for or upon no other use, trust, intent, or purpose whatsoever." * * *

Mary Croxall, the wife of Charles, the daughter of Robert Morris, was married to him before the making of the indenture and they had several children, some born before and some after it was executed, all of whom died unmarried and without issue in the lifetime of their parents, except four namely, Thomas, Daniel, Anne and Morris Croxall.

Thomas Croxall was married and had nine children, three of whom died without issue in the lifetime of their father. The remaining six, one of whom was the plaintiff, Robert Morris Croxall survived the said Thomas, and were living at the time of the suit.

February 14, 1818, the legislature of New Jersey, passed an Act appointing commissioners with power to divide the estate in four equal parts and to set aside to each of the children of Charles and Mary Croxall, a one-fourth part in severalty. This was done. The suit is brought by one of the children of Thomas Croxall, deceased, against a grantee of a portion of the land set apart for Morris Croxall.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Whether under the deed of Robert Morris of the 15th November, 1793, Charles Croxall was tenant for life, remainder to Mary Croxall his wife, for life, remainder to their son Thomas Croxall in tail—whether Mary Croxall was not the donee in tail under the rule in Shelley's case, and if so, whether her estate was a legal or equitable one—and whether Thomas Croxall was not the donee or first tenant in tail, and if he were the first or the second tenant in tail, whether he took a legal estate by the operation of the statute of uses, then in force in New Jersey, or whether he took an equitable estate, the statute not executing the use created by the deed for his benefit, are questions not without difficulty, and upon which the views of some members of the court are not in harmony with those of others. As there are grounds of decision, not involving these inquiries, upon which we are all united in opinion, except one member of the court, as to one of the propositions, it is deemed proper to place our judgment upon those grounds and not to go beyond them. If Thomas Croxall, and not his mother, was the first tenant in tail, taking under the deed by purchase, and not by limitation, it is immaterial whether

his estate was legal or equitable. In the law, if real property, the principles which apply to estates of both kinds, with a few limited exceptions not affecting this case, are the same. In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate.

The trust like the legal estate is descendible, devisable, alienable, and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate, is true in equity of the trust estate.

The rule in Shelley's case applies alike to equitable and to legal estates; and an equitable estate tail may be barred in the same manner as an estate tail at law, and this end cannot be accomplished in any other way.

In *Doe v. Oliver*, the testator had devised lands to his wife for life; remainder to the children of his brother who should be living at the death of his wife. But one child, a daughter, was living at that time. She with her husband, in the lifetime of the devisee of the life estate, levied a fine, and declared the use to A. B. after the death of the first devisee, and the termination of her life estate.

A. B. brought an action of ejectment for the lands, and recovered. It was held that the fine had a double operation, that it bound the husband and wife by estoppel or conclusion, so long as the contingencies continued, and that when the contingency happened, the estate which devolved upon the wife fed the estoppel, that the estate by estoppel created by the fine, ceased to be an estate by estoppel only, and became an interest, and gave to A. B. exactly what he would have had if the contingency had happened before the fine was levied. If Mary Croxall took under the deed an equitable contingent remainder for life, and Thomas at her death would have taken a legal estate tail, if the estate still subsisted, the statute in his case, executing the use, then the estates could not coalesce, one being legal and the other equitable, and the rule in Shelley's case would not apply. In that view of the subject Thomas and not his mother was the donee in tail.

A use limited upon a use, is not executed or affected by the statute of uses. The statute executes only the first use. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee. But

the second use may be valid as a trust, and enforced in equity according to the rights of the parties.

But without pursuing the subject, let it be conceded, for the purposes of this case, that Thomas Croxall was the donee or first tenant in tail, and that he took a legal estate, as contended by the counsel for the plaintiff in error.

Taking this view of the subject, the first inquiry to which we shall direct our attention is as to the effect of the act of the legislature of the 14th of February, 1818, and of the proceedings which were had under it. All the parties in interest then *in esse*, were before the legislature, and asked for the act, or consented that it should be passed.

There is no ground for the imputation upon either of them of any fraud, indirection, or concealment. It is not denied that the act was deliberately passed, nor that the partition made under it by the commissioners was fair and equal; all the parties testified their approbation, and confirmed it by their subsequent conveyances. The legal doubts and difficulties which hung over the deed, the uncertainty of the rights of the several parties; the learned and elaborate arguments, and conflicting views of the counsel, and our differences of opinion in this litigation, evince the wisdom and the equity of the act. It is as clear by implication as it could be made by expression, that the object of the legislature was to dock the entail, and unfetter the estate. What is implied is as effectual, as what is expressed. If it were possible for the parties and the legislature to accomplish this object, it was thus done. Had they the power? When the deed was executed, the statute *de donis* was in force in New Jersey, but modified by the acts of her legislature of the 25th of August, 1784, and of the 3d of March, 1786. Fines and recoveries, as known in the English law, were then a part of her judicial system. They were abolished by the act of June 12th, 1799. By the act of 13th of June, 1799, it was declared that no British statutes should thereafter have any force within the State. The plaintiff's lessor was the son of Thomas Croxall and was born on the 29th of March, 1821. Estates tail, under the statute *de donis*, were before the passage of the statute, known in the common law as conditional fees. Like estates tail, they were limited to particular heirs to the exclusion of others. The condition was, that if the donee died, without leaving such heirs as were specified, the estate should revert to the grantor. According to the common law, upon the birth of such issue, the estate became absolute for three purposes:

1. The donee could alien, and thus bar his own issue and the reversioner.

2. He could forfeit the estate in fee simple for treason. Before he could only forfeit his life estate.

3. He could charge it with incumbrances. He might also alien before issue born, but in that case, the effect of the alienation was only to exclude the lord, during the life of the tenant, and that of his issue, if such issue were subsequently born, while if the alienation were after the birth, its effect was complete, and vested in the grantee a fee simple estate.

In this state of the law it became usual for the donee, as soon as the condition was fulfilled by the birth of issue, to alien, and afterwards to repurchase the land. This gave him a fee simple, absolute, for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the issue, for whom it was his object to provide. To prevent such results, and to enable the great families to transmit in perpetuity the possession of their estates to their posterity, the statute *de donis* of the 13 Edward I, known as the Statute of Westminster the 2d, was passed. It provided, "that the will of the donor, according to the form in his deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given upon condition, should not have the power of alienating the tenement so given whereby it might not remain after their death to their issue, or to the heir of the donor, if the issue should fail." Under this statute it was held that the donee had no longer a conditional fee governed by the rules of the common law, but that the estate was inalienable, and must descend "*per formam doni*," or pass in reversion. The evils arising from the statute were found to be very great. Repeated efforts were made by the Commons to effect its repeal. They were uniformly defeated by the nobility, in whose interest the statute was passed. It remained in force and was administered without evasion for about two centuries. In the reign of Edward IV it was held in Taltarem's case, that the entail might be destroyed by a common recovery. The effect of this process was to bar alike the issue, the reversioner, and all those to whom the donor had given other estates expectant on the death of the tenant in tail without issue. The demandant took an absolute estate in fee simple. Fines were subsequently resorted to for the same purpose. A statute of 32 Henry VIII declared a fine, duly levied by the tenant in tail, to be a complete bar to him and his heirs, and all others claiming under the

entail. Other incidents were subsequently, from time to time, annexed to such estates. By a statute of Henry VII, they were made liable for forfeiture for treason, at a later period they were made liable for the debts of the tenant to the crown, due by record or special contract; and still later they were made liable for all his debts in case of bankruptcy. The power to suffer a common recovery has been invariably held to be a privilege inseparably incident to an estate tail, and one which cannot be restrained by condition, limitation, custom, recognizance, or covenant.

Private acts of Parliament are one of the modes of acquiring title enumerated by Blackstone. They are resorted to when the power of the courts of justice is inadequate to give the proper relief and the exigencies of the case require the interposition of the broader power of the legislature. They were very numerous immediately after the restoration of Charles II. The validity of statutes affecting private interests in specific real property has been repeatedly recognized by this court.

Blackstone says: "Nothing also is done without the consent expressly given of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall be perversely and without any reason withheld". Here all who were interested consented. No interest vested or contingent of the lessor of the plaintiff in error was involved; and no consent was asked of him, for the reason that he was then unborn.

In *Westby v. Kiernan*, it was held that a private act passed to enable the tenant in tail to raise money bound the remainder. This involved the power to destroy the estate by incumbering the property to the full amount of its value.

We entertain no doubt that the act in question was valid, and that the partition made under it, and the deeds subsequently executed, vested in each grantee a fee simple estate. This was the necessary result, whatever the quantity and character of the estates of Mary and Thomas Croxall at that time. * * *

Judgment affirmed.

TYRREL'S CASE.

Dyer 155a. (1557)

Jane Tyrrel, widow, for the sum of four hundred pounds paid by G. Tyrrel her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. 6, bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, &c., to have and to hold, the said, &c., to the said G. T. and his heirs forever to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the said G. T., and the heirs of his body lawfully begotten, and in default of such issue, to the use of the heirs of the said Jane forever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*. And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrolment, &c. And this case has been doubted in the Common Pleas before now; *ideo quaere legem*. But all the judges of C. B. and Saunders, Chief Justice, thought that the limitation of uses above is void, &c., for suppose the Statute of Enrolments (cap. 16) had never been made, but only the Statute of Uses (cap. 10) in 27 H. 8, then the case could not be, because an use cannot be engendered of an use, &c.

SEC. 2. TRUSTS.

CAREY ET AL. v. BROWN.

92 U. S. 171, 23 L. Ed. 469. (1875)

MR. JUSTICE SWAYNE delivered the opinion of the court.

* * * The general rule is, that in suits, respecting trust-property, brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story's Eq. Pl., sect. 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust-property or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties. Horsley

v. Fawcett, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested." Such is now the settled rule of equity pleading and practice. *Adams v. Bradley et al.*, 6 Mich. 346; *Ashton v. The Atlantic Bank*, 3 Allen, 217; *Boyden v. Partridge et al.*, 2 Gray, 191; *Swift and Others v. Stebbins*, 4 Stew. & P. 447; *The Association, &c. v. Beekman, Adm'r., et al.*, 21 Barb. 555; *Alexander v. Cana*, 1 De G. & Sm. Ch. 415; *Potts v. The Thames Haven and Dock Co.*, 7 Eng. Law & Eq. 262; *Story v. Livingston's Ex'r*, 13 Pet. 359. Where the want of parties appears on the face of the bill, the objection may be taken by demurrer. Where it does not so appear, it must be made by plea or answer. Here the defect, if there was one, did not appear in the bill, and no plea or answer setting it up was filed in the Circuit Court. It was first made here. A formal objection of this kind cannot avail the party making it, when made for the first time in this court. *Story v. Livingston's Ex'r*, *supra*. * * *

NELLIS v. RICKARD.

133 Cal. 617; 85 Am. St. Rep. 227; 66 Pac. 32. (1901)

CHIPMAN, C. Action to quiet title. Plaintiff had judgment, from which and from the order denying motion for new trial defendants appeal.

Defendant Mattie S. Rickard claims title under deed of trust from her father, Dr. Richard H. McDonald, to her, June 27, 1891. She was at the time the wife of John C. Spencer, and had four children living, and they are still living. She had no other child. These children were born respectively, on the following dates: November 28, 1879; October 10, 1881; October 15, 1883; March 15, 1885. She was divorced from Spencer, and married her codefendant, Kenneth C. Rickard, with whom she is now living. Dr. McDonald was a member of his daughter's household in June, 1891. Plaintiff was a judgment creditor of McDonald, and claims under execution sale

and sheriff's deed of date subsequent to 1891. The deed of trust is between Dr. McDonald, party of the first part, and Mattie S. Spencer, party of the second part, and recites that Mrs. Spencer (now Mrs. Rickard) is the grantor's daughter, and that "in consideration of the affection which the party of the first part has for her children, and the trust reposed in her, he does by these presents give, grant, and convey unto the party of the second part (the lands in controversy), to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, in trust, for the uses and purposes herein set forth, and none other, to wit, to possess, control, and have the income of said property during the natural life of the said party of the second part, and upon her death, then the net income of said property shall belong to her children, share and share alike, except in case of the death of any such child or children leaving issue, then the share otherwise going to such child or children shall go to the issue of such child or children, until the youngest child of the party of the second part arrives at the age of twenty-five years, thereupon the said property shall vest in fee, share and share alike, in said children, and the issue of the aforesaid child or children, if any there be. The said party of the second part, or her aforesaid successors, shall have no power to alienate, encumber, or create a lien on said property, or to lease the same for a term to exceed five years, and the income of said property shall be paid monthly."

To rescue the deed entirely from the operation of the statute against perpetuities, or if this cannot be done, to give it effect to some extent, appellants contend: 1. That the deed conveyed the legal life estate to the grantor's daughter, Mrs. Spencer, free of any trust; and, if a trust was created, Mrs. Spencer's interest is severable from the trust for the children, and would not be affected by any invalidity of the latter trust; 2. If the deed created a trust of the remainder after the life estate, it was for the benefit only of children living at the date of the deed, and therefore did not contravene the statute; but even if it included after-born children, it may be construed as limiting its benefits to children in being, and it is the duty of the court so to construe the deed, if thereby a violation of the statute may be prevented; 3. That no trust was created for the children, but the title vests in them at the mother's death, subject, at most, to certain restrictions on their mode of enjoyment until the youngest shall have arrived at the age of twenty-five years; 4. If the deed attempted to create a trust of the remainder for all the

children of Mrs. Spencer, and such trust would be void, still the gift to the children takes effect, and will be upheld, the trust being disregarded; that in no aspect of the deed was any interest or reversion left in McDonald, or acquired under execution sale against him.

It is undoubtedly true, as a general proposition, that where an equitable estate and a legal estate meet in the same person, the former is merged in the latter, if the two estates are commensurate and co-extensive, and if the merger is not contrary to the intention of the parties: Lewin on Trusts, *14, *665; Perry on Trusts, secs. 13, 347. And, ordinarily, a *cestuis que trust* should not be appointed trustee. But the authorities hold that a *cestui que trust* is not absolutely incapacitated from being a trustee, "as the court itself, under special circumstances, appoints a *cestuis que trust* a trustee. The question is one merely of relative fitness:" Lewin on Trusts, *665; Perry on Trusts, secs. 59, 297, and cases cited; Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, where a trustee was also a beneficiary.

Respondent contends that there could be no merger in this case, because the beneficiary takes no interest in the estate, and there was no estate to merge, the entire legal and equitable title passing by the deed to the trustee, the beneficiary having only the right to have the trust enforced: In re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, and note, 41 Pac. 772.

It is not necessary to decide these questions. We think a trust was intended to be created, and was created, but it is not a single trust, constituting an indivisible scheme for the disposition of the grantor's property, and incapable of being considered by its several parts. The deed establishes: 1. A trust for the benefit of Mrs. Spencer, by which she was to have the incomes of the property during her natural life, and the only restraint put upon her related to the disposition of the *corpus* of the estate; there was no restriction whatever as to the incomes, all of which she was to enjoy during her natural life. As there was here no restraint on alienation beyond lives in being, the trust, as to her, did not contravene the statute. 2. A further trust was established, by which, at Mrs. Spencer's death, her children, and the issue of such children, were to enjoy the net incomes of the property until a certain period, when the fee was to vest in the survivors. As to this latter trust it is urged by respondent that the alienation was suspended beyond the legal period, and that this trust is not only void, but its invalidity taints the entire instrument, in consequence of which the whole trust must be held

void, and that the property was subject to execution, on plaintiff's judgment against the grantor of the trust deed.

If it be true that the trust created by the deed is of such a nature as to make it indivisible, and incapable of being carried out as to that trust which is clearly legal, because of the alleged invalidity of the other trust, and if the other trust is in fact illegal, plaintiff's contention would be sound. But as we think the trusts are severable, it becomes immaterial whether or not the trust as to the children is valid. The children are not made parties; all the parties to the trust are living; the judgment here as to Mrs. Spencer's interest will not affect the rights of the children after her interest ceases. We need not, therefore, determine the children's rights in the event of Mrs. Spencer's death, should they or any of them outlive her.

In *Estate of Hendy*, 118 Cal. 656, 50 Pac. 753, the testator left a bequest of five thousand dollars to his niece, Mrs. Green, to be held in trust by his executors for her benefit, and the interest to be paid her monthly, and at her death "the same to be continued to her two children, Harrold and Mildred Green, until they are each twenty-five years of age, when the five thousand dollars shall be paid to them, share and share alike." Mrs. Green petitioned to have the legacy distributed to her absolutely, on the assumption that the trust declared was void for undue suspension of the power of alienation: Civ. Code, sec. 715. It was held that the will did not create a single trust, but established: 1. A trust for the benefit of Mrs. Green; and 2. A trust for the benefit of her two children. And it was said: "Harrold and Mildred were in being at the creation of the trust, and are still living and in their minorities. Therefore, whatever conclusion may be reached as to the validity of the trust for the children, it is obvious that there can be no legal objection advanced against the trust to Mrs. Green * * * It is manifest therefore, that the decree awarding Mrs. Green five thousand dollars as an absolute legacy must be reversed, since the trust, as to her, being valid and distinct from that on behalf of her children, the utmost she would be entitled to receive in any event would be the income from the fund during her life. The future disposition of the principal of the fund would concern only the children and the residuary legatees." It is true that the court proceeded to show that the trust to the children also was valid, and it is hence urged by respondent that the case is not decisive of the present one. As we understand the decision, however, there was a clear and distinct expression of belief that the invalidity of the trust to the children would make no

difference in the conclusion as to Mrs. Green's rights. And the court disposed of the other aspect of the case because the matter was in probate, and seemed to call for a settlement of the children's rights, and not because it had any necessary bearing on the trust as to Mrs. Green. We are unable to distinguish between that case and the present one, and, besides, we are satisfied, upon authority and upon reason, that the trust as to Mrs. Spencer, should be upheld. Mr. Gray says, in his rule against Perpetuities, section 341: "When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails. And the courts naturally, and properly, lean to construing the gifts separately, when it can be done."

It was stated as the rule in *Harrison v. Harrison*, 36 N. Y. 543, that it is no objection that the limitations, as well those which are good as the one alleged to be bad, are embraced in a single trust. Such trust, created for two purposes,—one lawful and the other unlawful—is good for the lawful purpose, though void as to the unlawful one.

Amory v. Lord, 9 N. Y. 403, was referred to and distinguished because in that case "the estate in the rents and profits, etc., devised for the benefit of the children, and the remainder in fee to the grandchildren, were so mixed up with, and dependent upon, the illegal and void one (the life estate in the surviving husband or wife), that it was impossible to sustain the one without giving effect to the other." That is precisely the distinction we find in the numerous cases on the subject where there is apparent conflict. If the several trusts are not so inter-dependent as that neither one can be dealt with without giving effect to all the others, the court will sort out the good from the bad, and give effect to the valid trusts.

It was said by the court in *Van Schuyver v. Mulford*, 59 N. Y. 426, 432, where previous similar cases were re-examined, that "if the estate was vested, under the will, in a trustee, upon several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal or invalid trusts."

The rule was thus expressed in *Tiers v. Tiers*, 98 N. Y. 568: "The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will,

but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate."

That this is the generally accepted rule we think there is no doubt. Looking at the deed before us, what seems to us to be intended as the primary trust is the trust for the benefit of Mrs. Spencer, and the ulterior contingent limitation is easily separable from the primary trust, and is but incidental, its purpose being to provide for a contingency which may never arise, since Mrs. Spencer may outlive all her children, and the failure of the provision as to them would not affect the trust as to her.

The judgment and order should be reversed.

WARE v. RICHARDSON.

3 Md. 505; 56 Am. Dec. 762. (1853)

MASON, J. * * * The appellee, Charles Richardson, filed his bill of complaint in Baltimore County Court, as a court of equity, against the appellants, asking for a sale of the real estate of Eliza Richardson, deceased, for the payment of her debts. He claimed to be a creditor in his own right, and also as administrator *de bonis non* of Robert R. Richardson, deceased. The bill alleges that letters testamentary were granted on the estate of the said Robert to the said Eliza Richardson, who by virtue thereof, possessed herself of the personal estate of her testator, and partially administered the same, but died before she had returned any account of her administration. The complainant thereupon administered upon her estate, and also upon the estate *de bonis non* of Robert Richardson. The bill charges that Mrs. Richardson died largely indebted; and that her personal estate was insufficient to pay her debts, and thereupon prays the sale of her real estate under the direction of the chancery court; and that the proceeds of sale may be appropriated to the payment of her debts.

The real estate which the complainant seeks to charge with the debts of Mrs. Richardson was derived by the deed of Arianah Kennedy, executed in the year 1802 to Samuel N. Ridgely, which is set out at length in the record. That deed is, in part, in these words: "Witnesseeth that the said Arianah Kennedy, in consideration of the natural love and affection which she hath and beareth towards Eliza-

beth Richardson, wife of Robert Richardson, and in consideration of the sum of five shillings, current money, to her in hand paid by the said Samuel N. Ridgely, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, enfeoff, release, convey, and confirm unto the said Samuel N. Ridgely, his heirs and assigns (here the property is described), to have and to hold the same and every part thereof unto the said Samuel N. Ridgely, his heirs and assigns forever, in trust, nevertheless that the said Areanah Kennedy shall and may, during the time of her natural life, have, hold, use, and enjoy the said piece or parcel of ground and premises, and the rents, issues, and profits thereof, and the same convert to her own use and benefit, and from and immediately after her decease, then upon this further trust that the said Elizabeth Richardson shall and may, during her life, have, hold, use, occupy, possess, and enjoy the said piece or parcel of ground and premises, and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble, or control of her present or any future husband, or being in any manner liable or subject to the payment of his debts, as fully in every respect as if she was sole and unmarried, and from and immediately after the death of the said Elizabeth, then to and for the use and benefit of the legal heirs and representatives of the said Elizabeth, and to and for no other intent and purpose."

The defendants in their answer insist that under the terms of the foregoing deed the said Eliza had but a life estate in the premises thereby conveyed, and that on her death the fee devolved upon her children and heirs, namely, the complainant and his deceased brother. The first question, therefore which is presented by the present record is, whether Elizabeth Richardson had a fee or a life estate in the realty embraced in the deed from Areanah Kennedy. * * *

In this connection, it becomes necessary to inquire when the legal estate vests in the trustee, and thereby becomes a trust estate, or when it vests in the *cestui que use*, under the statute of uses.

"A use is, where the legal estate of lands was in a certain person, and a trust was also reposed in him that some other person should take and enjoy the rents and profits. In other words, a use was a mere confidence in a friend (before the statute of uses), that the feoffees to whom the lands were given should permit the feoffor and

his heirs, and such other person as he might designate, to receive the profits of the land: Gilbert on Uses, 1.

The whole system of uses, however, was abolished or remodeled by the statute of 27 Hen. VIII., c. 10, commonly known as the statute of uses. By the provisions of that statute, the use was transferred into possession by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee. The strict construction which was given to this statute by the judges of its time, and the inconvenience and injustice which thereby followed, led, after a lapse of time, through the interposition of a court of chancery, and the ingenuity and learning of lawyers, to the establishment of a regular and enlightened system of trusts. In this way uses were partially revived under the name of trusts. In regard to this revival of the equity jurisdiction in respect to trusts, Lord Mansfield has said, in *Burgess v. Wheate*, 1 W. Black. 123, "that it has not only remedied the mischiefs of uses so much complained of, but has given occasion to raise up a system of equity, noble, rational, and uniform, in place of a system at once unjust and inconvenient. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid."

A trust, therefore, is a use not executed under the statute of Henry VIII., in the *cestui que use*, but the legal estate is vested in the grantee or trustee.

It becomes, however, frequently a matter of difficult solution to determine when the estate is vested under the statute in the *cestui que use*, or when as a trust it vests in the trustee; and the present case is one by no means free from difficulty on this point.

The inquiry here is, In whom did the legal estate vest under the present deed? It is to be observed that such a trust as is here contended for might readily have been created by express terms: as for instance, if the property had been conveyed to Ridgely and his heirs, to the use or unto the use of him and his heirs in trust for Mrs. Richardson, it would have been a complete disposition of the whole legal estate to the trustee: 2 Crabb's Law of Real Prop. 508. In such a case the use and possession which constitute the legal estate are both vested in the trustee, while the rents and profits would belong to the *cestui que use*. But the supposed case is not this case. If there is a trust in Mrs. Richardson, it is not created by express, technical terms, but it results from the intention of the grantor to do so, as manifested upon the face of the deed, an intention so clear as

not to be defeated or controlled by the strict rules of interpretation. It is clear that the mere interposition of a trustee to protect and secure a trust estate in a third person, even though a married woman, will not prevent the use from being executed in the *cestui que use*, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust. And a distinction has been taken between a devise or deed to a person in trust to collect and pay over the rents and profits to another, and a devise in trust to permit another to enjoy the rents and profits. In the first, the use is executed in the trustee; in the second, in the *cestui que use*. It would follow, then, was Mrs. Richardson not a married woman, or was not the estate by the terms of the deed limited to her sole and separate use, independent of her husband, that this would be a conveyance under the statute, and would vest the legal estate in her notwithstanding her coverture, or the provision that she was to have but a life estate. But in the present case, the deed provides that the property shall be held in trust "for her own proper use and benefit, notwithstanding her coverture", etc., and "as if she was sole and unmarried." As has already been intimated, in all cases where a deed or will involves an object or purpose which can not be carried into operation without the active agency of the trustee, such as the collecting and paying over of the rents and profits of land to a married woman for her sole and separate use, the execution of conveyances, etc., then it becomes a special trust, and not a use executed in her; and the question in this case is, Does the deed impose such active duties upon the trustee as will render it necessary for him to have the legal estate to discharge those duties, or is he a mere nominal, inactive agent, who is embraced within the statute of uses?

Most of the elementary writers broadly assert that where the trustee is to hold in trust for the sole and separate use of a married woman, it is a trust, and not a use executed under the statute: 1 Cruise Dig. 456; 2 Crabb's Law of Real Prop. 509; Clancy on H. & W. 256. It is, however, to be regretted, for the sake of the simplification of this question, that the adjudications cited by the books do not with unanimity sustain the proposition to the length to which it is stated. Most of the cases cited by the text-writers will be found to relate to deeds or wills which impose upon the trustee some active functions, such as collecting and paying over the rents, etc., and while, therefore, they do not contradict the proposition, they, notwithstanding, do not sustain it as it is broadly announced: Nevil

v. Saunders, 1 Vern. 415; Jones v. Say and Seal, 1 Eq. Cas. Abr. 383; 8 Vin. Abr. 262; Lord Chief Justice Holt, in South v. Alleine, 1 Salk. 228; Griffith v. Smith, Moore, 753; Bush v. Allen, 5 Mod. 63; and a number of other cases to the same purpose might be cited.

The intention of the grantor is to prevail in cases like the present, but with this qualification, that it must not contravene or defeat the established rules of construction, or in other words, the intention is to be ascertained by the legal rules of interpretation. Unless, therefore, this deed, in accordance with one of those rules, assigns to the trustee the performance of some duty necessary for the enjoyment of the estate by the *feme covert*, the legal estate would not vest in the trustee. It would seem to follow as a necessary consequence, from the very nature of the present transaction, that a deed to a trustee for the sole and separate use of a married woman would imply that the trustee's aid was invoked and his active services required to support the independent character of the wife. The rights and powers of married women are ordinarily merged in those of their husbands, and whenever it becomes important to invest her with sole and independent powers, it becomes necessary that that character should be exercised through the medium of a trustee. It is now settled, that where bequests or conveyances are made to married women for their separate use, without the nomination of trustees, the husbands, in equity, will be considered as trustees for their wives, and will be required to comply with the intention of the donor: Clancy on H. & W. 257. A separate estate in real property could not be enjoyed by a married woman, unless through the interposition of a trustee, which circumstance of itself would imply the performance of some active duties on his part. Not so, however, with persons not laboring under the same disabilities with married women. In such cases no intervening agent is necessary to enable them to enjoy the property, and therefore the legal estate is vested in them when it would not be in a *feme covert*. Thus, in the case of Broughton v. Langley, 2 Ld. Raym, 873, where lands were devised to trustees and their heirs, to the intent to permit A. to receive the rents for his life, etc., it was determined that this would have been a plain trust at common law, and as such executed by the statute. And so it would have been, even if the *cestui que trust* were a married woman; provided the estate was not limited to her sole and separate use.

It is true that there are some cases which have carried this doctrine so far as to embrace within its operation deeds and wills con-

veying property to married women for their separate use, and have declared the estate to be executed under the statute in the *feme covert*. The only cases brought to our notice favoring this doctrine are *Williams v. Waters*, 14 Mee. & W. 166; *Douglas v. Congreve*, 1 Beav. 59; *South v. Alleine*, 1 Salk. 228. In the first of those cases, *Williams v. Waters*, it would seem that a different interpretation would have been given to the instrument by a court of chancery, from a remark made by Rolfe, B., in his opinion. He observed: "It is said we are to construe the deed otherwise, because so the intention of the parties will be effected; but so it may in other ways; it will now, by the interposition of a court of equity." And Baron Parke says: "We cannot collect clearly from the words of the deed that they intended to give the trustees an active trust, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife." Thus this case sanctions the principle that where an active trust is imposed upon the trustee he takes the legal estate. The case of *Douglas v. Congreve* is, in important particulars, dissimilar from the case now before us. There the devise was to the wife for her life, for her independent use and benefit, followed by a direct devise after her death to her husband, for his natural life, with remainder to the use of the heirs of her body, etc. The court decided that the strict rules of construction were to prevail, because an intention to the contrary was not sufficiently manifest on the face of the will. The case of *South v. Alleine*, it must be admitted directly supports the views of the appellee's counsel. But the authority of that case is greatly weakened, if not entirely overthrown, by the fact that Holt, C. J., dissented from the opinion of Rokesby and Eyre, JJ., and that the opinion of the chief Justice has been repeatedly sustained by subsequent decisions of the highest authority.

The position assumed by the counsel for the appellee, that it does not necessarily follow by vesting the legal estate in the wife that thereby you establish the marital rights of the husband in opposition to the contrary intention of the grantor, we think is not sustained by the authorities. In most of the cases it is conceded that by executing the use in the wife, the husband acquires control over the property, and that very result is assigned as a reason why a different construction should be given to the instrument in order to effectuate the intention of the grantor. In the case of *Bush v. Allen*, 5 Mod. 63, Justice Rokesby, in reply to the argument that the legal estate vested in the wife, remarked: "But then the husband shall inter-

meddle when the devisor intended to exclude him." And in the great case upon this subject, *Harton v. Harton*, 7 T. R. 652, Lord Kenyon said "that whether this were a use executed in the trustees or not, must depend upon the intention of the devisor. This provision was made to secure to a *feme covert* a separate allowance, to effectuate which it was essentially necessary that the trustees should take the estate with the use executed, for otherwise, the husband would be entitled to receive the profits, and so defeat the object of the devisor." And also in the case of *Williams v. Waters*, 14 Mee. & W. 166, Parke, B., concedes that the husband could not be excluded if the legal estate vested in the wife.

In the consideration of this case it would be difficult for us to refer to the numerous cases which relate to the subject, much more to attempt to reconcile them with each other. That there is some conflict of opinion upon the subject cannot be denied. The later and more modern decisions, however, seem to favor a more liberal construction of deeds and wills in order to reach the real intention of their makers, and therefore in all cases where an estate is devised or conveyed to trustees for the separate use for a married woman and her heirs, this court will if possible so construe the instrument as to vest the legal estate in the trustees, because such a construction will best effectuate the intention of the donor. We think this conclusion would follow from the general principles which we have endeavored to maintain in this opinion, and is warranted by a current of decisions of the highest weight and authority. * * *

RENZ v. STOLL.

94 Mich. 377; 34 Am. St. Rep. 358; 54 N. W. 276. (1892)

MONTGOMERY, J. The complainant filed a bill in the Wayne Circuit, in chancery, to have certain lands in the city of Detroit decreed to have been held in trust by Baumeister for her, and to enforce the trust. Since the filing of the bill Baumeister has died, and the case proceeds against his administrator and codefendant, who was Baumeister's grantee.

The history of the legal title is as follows: On September 1, 1873, Henry Renz deeded the land to his wife, Emma Renz, the complainant. On August 10, 1874, complainant deeded the same to

John Winterhalter. January 11, 1875, John Winterhalter deeded the land to John Baumeister, subject to all mortgages. There were at that time three mortgages on the land,—one to William Krenning, for two thousand five hundred dollars; one to the Detroit Building and Savings Association, for one thousand dollars; and one to Henry Wineman, for one thousand five hundred dollars, upon which it would appear, however, that there was but four hundred and eighty dollars due, at the time of the transfer to Baumeister. The consideration named in the deed from complainant to Winterhalter was six thousand dollars, and the value of the property at this time is not otherwise shown. The answer denies that the conveyance was made to Baumeister charged with any trust.

The complainant seeks to establish the trust by parol testimony. Rosa Haag, a daughter of complainant, testifies: "Mother had a conversation with Winterhalter in the forenoon. In the afternoon Mr. Baumeister came over to the house, and said, 'Well, Emma, I will take the papers, and do you the favor; and I will have a new deed made out, and deed it back to you, whenever you want it.' Mother said, when she handed him the papers: 'Here is everything in this envelope that belongs to the property; * * * now, you see that I get them all back like this.' And he said: 'I will; and I will have a new deed made out, and deed it back to you, whenever you want it.'"

The complainant also called Frederick Haag as a witness, who testified that in 1887 he had a conversation with Baumeister in which Baumeister admitted to him, in substance, that he held the property in trust for complainant, and his only claim against it was for moneys that he had paid out to discharge the mortgages and tax liens. This witness further testified that he subsequently wrote Mr. Baumeister, and received a letter in reply, which letter he was unable to produce, but stated the contents, in answer to the question, "What did he write?" as follows: "He wrote me that promise was all right, but he didn't know all the matters in the case. He says, 'I lost considerable by Renz', and something to the effect that he got even with him now. That is it."

The circuit judge held that under this testimony the complainant was not entitled to the relief prayed, and dismissed the bill. Complainant appeals.

Howell's Annotated Statutes, sec. 6179, provides that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any

manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing."

Unless we ignore the express provisions of this statute, we are compelled to hold that the conclusion of the circuit judge was correct. It may be conceded, as contended by complainant, that the declaration of trust need not be contained in the conveyance to the trustee, and that any form of instrument, whether a letter addressed to a third person or the answer of the alleged trustee in a chancery proceeding (*Patton v. Chamberlain*, 44 Mich. 5), will be sufficient to answer the requirements of the statute, and that there is no prescribed form of words in which the declaration must be made, in order to make it valid: *Ellis v. Secar*, 31 Mich. 185; 18 Am. Rep. 178. But the declaration in writing must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing; otherwise, the provisions of the statute would be rendered nugatory. The rule is well stated in *Perry on Trusts*, c. 3, sec. 83: "The objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust. Indeed, courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestui que trust*, and the proportions in which they are to take, cannot be ascertained. When all these particulars properly appear from writings signed by the party, the trust will be executed."

And again, in *Browne on Statute of Frauds*, c. 7, sec. 108, it is said: "The words used * * * must distinctly relate to the subject-matter, and must serve to show the court that there is a trust, and what that trust is." See also, *Gault v. Stormont*, 51 Mich. 636. The decree will be affirmed, with costs.

LONG, J. dissenting. I think there was sufficient evidence of the declaration of the trust to bring the case out of the statute, and that defendants should account with the complainant for the value of the property, and the rents and profits.

Note: In *Loring v. Palmer*, 118 U. S. 321; 6 Sup. Ct. 1073; the court found an express trust by reading together as one instrument various letters, memoranda, telegrams and a contract..

MEEKS v. OLPHERTS.

100 U. S. 564; 25 L. Ed. 735. (1879)

MR. JUSTICE MILLER delivered the opinion of the court.

This action was brought, Sep. 30, 1872, by Meeks against Olpherts and others to recover possession of a hundred-vara lot in the city of San Francisco.

On a stipulation waiving a jury the case was submitted to the court, which, on its findings of fact incorporated in this record, further found as a conclusion of law that the plaintiff's action was barred by sect. 190 of the Probate Act of California. Judgment was rendered for the defendants. Meeks sued out this writ of error.

The material facts in the case are few and easily understood.

George Harlan died intestate July 8, 1850, seised of the title to the lot in question, except as that title may have been nominally in the United States. By the Act of Congress of 1864 his title was confirmed, and it inured to the benefit of any one rightfully holding under him.

On the 19th of August, 1850, Henry C. Smith was duly appointed administrator of Harlan's estate, and having afterwards resigned, Benjamin Aspinall was appointed in his place, June 15, 1855.

On the seventh day of January, 1856, Aspinall, by an order of the Probate Court, sold the lot in question, with many others. Under this sale the defendants, or those under whom they claim, entered into possession, which they have held uninterruptedly to the present time. Aspinall remained administrator until May 12, 1864, when he settled up his accounts and was discharged. Joel Harlan and Lucien B. Huff, appointed in his place, are now administrators.

On the 6th of November, 1869, an order of distribution of the estate was made in the Probate Court, by which the lot in question was distributed to plaintiff. To this proceeding no objection is made as to its regularity.

It will thus be seen that the defendants had purchased the lot in controversy at a sale ordered by the Probate Court, and had paid their money for it, and been in the peaceable adverse possession of it since 1856, a period of sixteen years; and the court held that, whether the probate sale was valid so as to confer title or not, the Statute of Limitations applicable to such cases was a bar to plaintiff's right of recovery. * * *

And by section 194 of the Probate Act of California the administrator is again required to "take into his possession all the estate of the deceased, real and personal."

While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of the heirs and of the creditors of the estate, and as such had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs, or any one else injured by that failure.

Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by his sale as administrator to the defendants. Instances are numerous of persons making sales that are invalid, avoiding them by the very act of bringing an action of ejectment. Such are the cases of infants and married women who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowledgments of the deeds.

There was, then, up to the date of the order of distribution, or until it was barred by the statute, a right in the administrator of the estate of Harlan to sue for and recover the possession sought in the present action.

This being so, it is not easy to perceive why that right of action was not barred in three years from Jan. 7, 1856, the day on which defendants purchased and took possession. This would make the bar complete Jan. 7, 1859. During all that time Aspinall was administrator and for five years afterwards, and nothing obstructed his legal right to sue for and recover the possession. Nor is the case otherwise if the right of action began with the relinquishment of title by the act of Congress of 1864. * * *

The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. "In all suits for the benefit of the estate he represents both the creditors and the heirs," said the Supreme Court in *Beckett v. Selover*, 7 Cal. 215.

Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of

cestui que trust thus represented is also barred. This doctrine is clearly stated in *Hill on Trustees*, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American.

Among those specially applicable to this case are *Smilie v. Biffle*, 2 Pa. St. 52; *Couch's Heirs v. Couch's Administrator*, 9 B. Mon. (Ky.) 160; *Rosson v. Anderson*, id. 423; *Darnall v. Adams*, 13 id. 273.

In the first of these cases, land was devised to executors, with a power of sale, which was imperfectly executed, by one of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the Statute of Limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in *Lewellen v. Mackworth* (2 Eq. Cas. Abr. 579), the court says: "Therefore, where *cestui que trust* and trustees are both out of possession, for the time limited, the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land, to take the rents, issues, and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee simple and appropriate the interest of the purchase-money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect, the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He, therefore, held adversely to both *cestui que trust* and trustee, and consequently obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gain-said."

In the case of *Rosson v. Anderson* (*supra*), the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor.

One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the Statute of Limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors, and, as more than five years had elapsed after they had qualified as such, the statute was

a bar against them, and as they would have been barred by the statute, so was the heir, though a minor when the cause of action accrued.

In *Darnall v. Adams*. (*supra*), which concerned a devise of slaves, the same court held that the disability of coverture in the devisee could not prevent the running of the Statute of Limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which bars the executor. *Coleman v. Walker, &c.*, 3 Metc. (Ky.) 65, and *Edwards v. Woolfolk's Administrator*, 17 B. Mon. (Ky.) 376, are cases which assert the same doctrine, and in the latter the principle is fully and ably discussed and its soundness well maintained.

A very strong case of the same character is that of *Croxall v. Sherrard* (5 Wall. 268), where a remainder-man was held barred by the Statute of Limitations of New Jersey, on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainder-man brought suit immediately on the death of his ancestor. This was, however, based on the peculiar wording of that statute.

In *Cunningham v. Ashley* (45 Cal. 485), it was held that an administrator, who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action.

On the whole, we are of opinion, both upon sound principles of construction, as well as upon the decisions of the Supreme Court of California construing the Statute of the State, that the Circuit Court was justified in holding that the plaintiffs were barred by the adverse possession of defendants.

Judgment affirmed.

COLTON v. COLTON.

127 U. S. 300; 8 Sup. Ct. 1164, 32 L. Ed. 138. (1888)

These are two bills in equity, one filed by Martha Colton and the other by Abigail R. Colton, each of whom is a citizen of the State of New York, against Ellen M. Colton, a citizen of California. Martha Colton alleged in her bill that she was a sister of David D. Colton, who died in San Francisco, Cal., on October 9, 1878, and that the defendant, Ellen M. Colton, is his widow; that on October 8, 1878, the said David D. Colton made and executed in due form his last will and testament, a copy, of which is made a part of the bill, and is set out as follows: "I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property, and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the Probate Court, or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her, the same provisions are hereby made applicable to them as I have before made for her in reference to bonds, and duties and powers." The bill then alleged that the estate of David D. Colton thus distributed to the defendant, though often demanded, has failed, neglected, and refused to make to the

plaintiff any gift or provision whatever from the estate of said David D. Colton.

The bill also contains the following allegations: "Your oratrix further shows that she has no estate, property, or income; that for many years she has been, and still is, dependent upon her mother, the said Abigail R. Colton, for her support and maintenance; that ever since your oratrix was a young child her said mother has been in feeble health, and has always required your oratrix's aid and services, and especially during the lengthened illness and last sickness of your oratrix's said father, and ever since the death of your oratrix's said father, as aforesaid, her said mother has been an invalid, and has endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of your oratrix.

The prayer of the bill is that the "defendant may be compelled to execute the terms and directions of the said last will and testament of the said David D. Colton, and to make your oratrix a suitable provision from the said estate of the said David D. Colton in such amount and in such manner as to your honors shall seem most meet and proper in the premises." Abigail R. Colton, complainant in the other bill, is the mother of Martha Colton, and also of David D. Colton, the testator. Her bill is in substance the same as that of Martha Colton, and prays for a similar relief. * * *

MR. JUSTICE MATTHEWS, after stating the facts as above, delivered the opinion of the court.

These appeals bring before us the will of David D. Colton for construction. The question is whether his widow, Ellen M. Colton, by its provisions, takes the whole estate of which he died seized and possessed absolutely in her own right, or whether she takes it charged with a trust enforceable in equity in favor of the complainants, and, if so, to what extent. The language of the will to be construed is as follows: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." * * *

The fundamental and controlling rules for the construction of wills are familiar and well understood. They were well stated by Chief Justice Marshall in delivering the opinion of this court in *Smith v. Bell*, 6 Pet. 68, as follows: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, pro-

vided it be consistent with the rules of law. *Davie v. Stevens*, 1 Doug. 322; *Perrin v. Blake*, 1 W. Bl. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions which he wills to be performed after his death.' 2 Bl. Comm. 499. These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. * * * No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. * * * Notwithstanding the reasonableness and good sense of this general rule that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone further. The construction put upon the words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly (*Gulliver v. Poyntz*, 3 Wils. 141) that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills." See *Clarke v. Boorman's Ex'rs*, 18 Wall. 493, 502. The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed. These rules of construction, indeed, apply to every written instrument, although in deeds and some other formal documents the long usage of

the law has, in certain cases, required the use of technical words and phrases to accomplish particular effects. No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words "upon trust" or "trustee," if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument. 1 Perry, Trusts, §§ 82, 151, 158; *Cresswell's Adm'r v. Jones*, 68 Ala. 420. The question upon the language of the present will, which constitutes the point in dispute, is whether the testator intended to charge his estate in the hands of his widow with a trust in favor of his mother and sister, or whether he intended his widow to take the estate free from any obligation of that character, at liberty to disregard the recommendation and request, and to make provision for his mother and sister or not, out of property absolutely her own, as she might choose. It is argued against the establishment of the trust in favor of the complainants that it is of the nature of those called "precatory trusts," founded originally in the earlier decisions of courts of equity in England and in this country, upon strained, artificial, and inappropriate interpretations of the language of testators, whereby their real intentions were perverted and defeated, according to a rule which is no longer favored as an existing doctrine of equity, and which is excluded by the express terms of the Civil Code of California, according to which the will in this case must be construed. * * * It will be observed, however, that these statutory provisions of the State of California are merely declaratory of pre-existing law, and are perfectly consistent, if not identical, with the rules of construction already noticed as of controlling and universal application.

As to the doctrine of precatory trusts, it is quite unnecessary to trace its origin, or review the numerous judicial decisions in England and in this country which record its various applications. If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it "precatory." The question of its existence, after all, depends upon

the intention of the testator, as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not take away, the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary. "All the cases upon a subject like this," said Lord Chancellor Cottenham in *Shaw v. Lawless*, 5 Clark & F. 129, 153, "must proceed on a consideration of what was the intention of the testator." In *Williams v. Williams*, 1 Sim. (N. S.) 358, 369, Vice-Chancellor Cranworth said: "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion." And referring to rules for ascertaining this intention sought to be deduced from the numerous decisions on the subject, he adds: "I doubt if there can exist any formula for bringing to a direct test the question whether words of request, or hope, or recommendation are or are not to be construed as obligatory." In *Briggs v. Penny*, 3 Macn. & G. 546, Lord Chancellor Truro stated the same rule with a little more particularity. He said: "I conceive the rule of construction to be that words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: *First*, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not: *secondly*, the subject must be certain, and *thirdly*, the objects expressed must not be too vague or indefinite to be enforced." The most recent declarations of the English courts of equity do not modify this statement of the law. *Lambe v. Eames*, L. R. 6 Ch. 597; *In re Hutchinson*, 8 Ch. Div. 540; *In re Adams*, 27 Ch. Div. 394, 406.

The existing state of the law on this question, as received in England, and generally followed in the courts of the several states of this

Union, is well stated by Gray, C. J., in *Hess v. Singler*, 114 Mass. 56, 59, as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the latter cases in this and in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court. In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence." In the previous case of *Warner v. Bates*, 98 Mass. 274, Chief Justice Bigelow vindicated the soundness and the value of this rule in the following commentary. He said: "The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator

in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee,—the just and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity against the trustee by those in whose behalf the beneficial use of the gift was intended.”

In the light of this rule, as thus stated and qualified, we proceed to ascertain the intention of the testator in this will as to the point in controversy. In the first place, the language of the bequest to his wife is undoubtedly sufficient to convey to her at his death the whole estate absolutely and without conditions. The will says: “I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to.” If this stood alone there could be no controversy as to the nature and extent of her title. But it does not stand alone, and it does not contain any expressions which necessarily anticipate or limit any subsequent provisions affecting it. It does not say expressly that she shall have the absolute right to use, for her own benefit exclusively, or the absolute right to dispose of, the estate which he gives to her. Her right to use and her power to dispose are merely the legal incidents of the title conveyed by the clause considered as unqualified by its context. But the bequest to the wife is immediately followed by the clause which is the subject of the present contention. In direct connection with this gift to his wife the testator adds: “I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best.” It may well be admitted that the recommendation of the testator to his wife to care for and protect his mother and sister, when they should be deprived of the care and protection which he could personally secure to them while he lived, is not sufficient of itself to create a trust and attach it to the estate of his widow, so as to be capable of enforcement. It is certainly the expression of a strong desire on the part of the testator for a continuance of care and protection by his legatee over his mother and sister, but, considered by itself, cannot be construed as creating in them an enforceable right to a beneficial interest in the estate given to his widow. It is rather a personal charge than a property charge. But he did not leave it so. The testator adds: “And request her to make such gift and provision for them as in her judgment will be best.” It is immaterial in the construction of this language to determine whether the word “gift” means a dona-

tion from the legatee or from the testator, for it is also to be a "provision." It is this which he requests, his widow to make, out of that provision which the testator made directly for her, consisting of the whole of his estate, real and personal. The entire estate bequeathed to his widow is thus affected by this request. Is that request equivalent to a command, or is it a mere solicitation, which, after his death, she may reject and disregard without violating the terms of the will, and the conditions upon which she accepted her estate under it? Is there anything in the language of the clause itself, in its context, or in the circumstances and situation of the testator when he framed it, to indicate an intention on his part to confer upon his widow the authority to accept his property, and at the same time to refuse to use it according to his request? Undoubtedly he gives to her some discretion on the subject; the gift and provision which he requests for his mother and sister is to be such as in her judgment will be best. It is to be such as will be best for them, having regard to all the circumstances, both of their necessities and the amount and sufficiency of the estate: and this proportion, which is to constitute what shall be best, is to be determined by the widow in the exercise of her judgment. It is her judgment that is to be called into exercise, and this excludes caprice, whim, and every merely arbitrary award; but whatever the judgment may be, and whatever discretion is involved in its exercise, it operates only upon the nature, form, character, and amount of the gift and provision intended for them. The fact of a gift and provision is presupposed, and stands on its own ground. Her judgment is not invoked as to that. The only ambiguity, in respect to whether there shall be a gift and provision or not, resides in the single word "request." Does that mean a wish of the testator which he intended to be fulfilled out of the means which he had furnished to make it effectual, or does it mean a posthumous petition which the testator understood himself as addressing to the favor and good-will of his sole legatee.

The situation of the testator at the time he framed these provisions is to be considered. He made his will October 8, 1878; he died the next day. It may be assumed that it was made in view of impending dissolution, in the very shadow of approaching death. There is room enough for the supposition that by this necessity the contents of his will were required to be brief; the conception of the general idea to give everything to his wife was simple and easily expressed, and capable of covering all other intended dispositions. The time and the circumstances perhaps disabled him from specifying satisfactory de-

tails concerning a provision for his mother and his sister, but he did not forget that he owed them care and protection. That care and protection, therefore, he recommended to his wife as his legatee; but he was not satisfied with that; he wished that care and protection to be embodied in a gift and provision for them out of the estate which he was to leave to her. He therefore requested her to make it, and that request he addressed to his legatee and principal beneficiary as expressive of his will that a gift and provision for his mother and sister should come out of it. His legacy to them was part of his legacy to her. All other particulars, as to its form and amount, he was willing to leave, and did leave, to be determined by his widow in her judgment of what would be best for his beneficiaries, so as to insure them that care and protection for which he was providing. The substance of the bequest was his own; the form of it, shaped only by the declared purpose of his bounty, he was willing to leave to the judgment of his wife. The alternative that such discretion should assume the power to disappoint his dispositions evidently was not present in his thoughts, as it is not implied in his words. The language of the testator immediately succeeding that under consideration throws some light on the meaning of the words in dispute. He says: "I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise." These were the daughters of the wife as well as of the testator, as it is to be inferred from the fact that he refers the whole subject of any provision for them to her love, and the provision which he requests in their behalf is to be not such "as in her judgment will be best," but only such "as she may in her love for them choose to exercise," leaving the whole question of a provision subject to the exercise of the legatee's choice, which the testator was quite willing to adopt as the dictate of the love of a mother for her children. It is also to be assumed that the circumstances and situation of his mother and sister were remembered by the testator in the act of making his will; that they were separated from his personal care by a wide distance; that his mother was a widow, and had nearly attained the age of three score years and ten; that even before the death of his father her health was feeble, and that since, she had been an invalid, enduring much sickness and suffering, requiring constant medical attendance, and the nursing and care of her daughter, who had always resided with her; that except the lot in Greenwood cemetery, where her husband was buried, she owned no real estate, and had no income except the

interest on \$15,000, which had been advanced to the testator himself by his father as a loan many years previously, and on the income from which the mother and daughter were obliged, with great economy and self-denial, to maintain themselves in very straitened circumstances. A recollection of their necessities, as well as natural love and affection, must have inspired that sentence of his will by which the testator recommended to his widow the care and protection of his mother and sister, giving commanding weight and solemnity to the accompanying request "to make such gift and provision for them as in her judgment will be best;" for he also well knew that such a provision, sufficient for their comfort and independence, would not sensibly diminish the abundance of the legacy to his wife out of which it must issue. It is an error to suppose that the word "request" necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter. *Burt v. Herron*, 66 Pa. St. 400. And in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malin v. Keighley*, 2 Ves. Jr. 333, 529, "the mode is only civility."

But it is also argued that the trust sought to be established under this will in favor of the complainants is incapable of execution by reason of the uncertainty as to the form and extent of the provision intended, and because it involves the exercise of discretionary power on the part of the trustee which a court of equity has no rightful authority to control. We have seen that whatever discretion is given by the will to the testator's widow does not affect the existence of the trust. That discretion does not involve the right to choose whether a provision shall be made or not; nor is there anything personal or arbitrary implied in it. It is to be the exercise of judgment directed to the care and protection of the beneficiaries by making such a pro-

vision as will best secure that end. There is nothing in this left so vague and indefinite that it cannot, by the usual processes of the law, be reduced to certainty. Courts of common law constantly determine the reasonable value of property sold, where there is no agreement as to price, and the judge and jury are frequently called upon to adjudge what are necessities for an infant or reasonable maintenance for a deserted wife. The principles of equity, and the machinery of its courts, are still better adapted to such inquiries. In the exercise of their discretion over trusts and trustees, it is a fundamental maxim that no trust shall fail for want of a trustee, and where the trustee appointed neglects, refuses, or becomes incapable of executing the trust, the court itself in many cases will act as trustee. In *Thorp v. Owen*, 2 Hare, 607, Wigram, V. C., said: "Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was ascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance, and advancement, provision, or other like indefinite expression, applicable to a fund larger confessedly than the party entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person." And in *Foley v. Parry*, 2 Mylne & K. 138, where the words of a will were, "and it is my particular wish and request that my dear wife and A. will superintend and take care of the education of D., so as to fit him for any respectable profession or employment," it was held that a charge was created on the interest taken by the testator's widow which could be made effectual by a court of equity. It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power, so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees. But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real, or personal security, and the trust fund is outstanding upon any hazardous security. Lewin, *Trusts*, (4th Eng. Ed.) c. 20, § 2, pp. 402, 403. In

the case of *Costabadie v. Costabadie*, 6 Hare, 410, 414, Vice-Chancellor Sir James Wigram said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have; that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy." But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly, and in good faith. In *re Hodges, Davey v. Ward*, L. R. 7 Ch. Div. 754. Plainly, if the trustee refuses altogether to exercise the discretion, with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself. On the whole, therefore, our conclusion is that each of the complainants in these bills is entitled to take a beneficial interest under the will of David D. Colton, to the extent, out of the estate given by him to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it. The decrees of the Circuit Court are accordingly reversed, and the causes remanded, with directions to overrule the demurrers to the several bills, and to take further proceedings therein not inconsistent with this opinion; and it is so ordered.

Note: There is an extensive note on the subject of Precatory Trusts in 106 Am. St. Rep. 499.

SMITHSONIAN INSTITUTION v. MEECH ET AL.

169 U. S. 398; 18 Sup. Ct. 396; 42 L. Ed. 793. (1898)

On June 4, 1895, the appellant, as plaintiff, filed its bill in the Supreme Court of the District of Columbia to enforce certain rights claimed under a will made by Robert S. Avery, on July 22, 1893. In this will, after sundry bequests to his own relatives, is the following:

"I bequeath to the sister and brothers of my late wife one thousand dollars (1,000), to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

"All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed, and wheresoever situate, I hereby give, devise, and bequeath unto the Smithsonian Institute, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors, forever.

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an ethereal medium which are treated of in atomic chemistry, and which are supposed to govern phenomena of electricity, magnetism, light, and heat. Prizes might be given for essays on these subjects, and upon such other kindred subjects as may meet the approval of the institution. I would like, however, to have published first the multiplying table and

also IV-plate logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called the 'Avery Fund' or the 'Fund Contributed by Robert S. Avery and His Wife, Lydia T. Avery, for the Extension of the Sciences'; and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787 in the city of Washington, D. C., being premises No. 326 A street, S. E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The testator died childless, on September 12, 1894. The will was probated February 2, 1895. He and his wife had lived for many years in Washington, he being in the employ of the government in the coast survey office. During these years he lived a quiet and retired life, devoting himself to scientific research, and experimenting chiefly in the matter of phonetic type. His wife was younger than he, and was, until shortly before her death, on November 18, 1890, in apparently good health. While they were both living, and on April 20, 1885, the real estate described in the last paragraph quoted from the will was purchased, the title being conveyed to Mrs. Avery.

The bill alleged that the lot was paid for with the money of Robert Avery; that the title was taken in the name of Mrs. Avery because it was supposed that she would outlive her husband, and upon an understanding and agreement that the property should, after their deaths, pass to the Smithsonian Institution, in pursuance of a mutual desire to make their gift to this institution as large as possible; that, notwithstanding these facts, the defendants, other than the executrix, claimed title to the property as the heirs of Mrs. Avery, and had demanded possession. The prayer was for a finding and decree that the equitable title was in Robert Avery, and passed to the plaintiff by his last will; that the defendants be enjoined from claiming any title thereto; and that the executrix be directed to treat the \$1,000 bequeathed to the sister and brothers as forfeited for breach of condition annexed to said legacy, and as having fallen into the *residuum*. After answer, testimony was taken, and the case was heard before Justice Hagner, of the Supreme Court, who rendered a decree in accordance with the prayer of the bill so far as respects the lot, but denying the relief sought as to the legacy on condition of the defendants executing a release of all claims to the realty. 24 Wash. Law Rep. 326. On appeal by all of the defendants, except the execu-

trix, the court of appeals reversed the decree of the Supreme Court, and remanded the case, with directions to dismiss the bill (8 App. D. C. 490); whereupon the plaintiff appealed to this court.

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The legal title to this property passed by the conveyances in 1885 to Mrs. Avery. She died without will. *Prima facie*, therefore, the title then passed to her heirs, the appellees. The plaintiff insists that in fact the purchase price was paid by Mr. Avery, and paid under an oral agreement, whereby a resulting trust was created which changed the course of the title; and the first questions are: Whose money paid for the lot, and was there such an agreement, and, if so, what were its terms?

That the money which was used in making payment for the lot was the money of Mr. Avery is not seriously questioned. Both Mr. and Mrs. Avery lived very economically, and this money was accumulated out of savings from the salary he received from the government. At the time of their marriage, Mrs. Avery had a small amount of money on deposit in a savings bank in Connecticut, and the books of the bank showed that no part of that amount was drawn out at or near the time of this conveyance. Her repeated declarations were to the same effect, and that Mr. Avery's money had paid for the property.

The trial court also found that there was an oral agreement—an agreement made at the time the property was conveyed to Mrs. Avery—that she should hold the property during her lifetime, and that she should make a will by which it should pass at her death to the Smithsonian Institution. The court of appeals held that the testimony did not establish the alleged agreement so clearly as to justify a court of equity in recognizing it as against the legal effect of the conveyance. We are constrained to differ with the court of appeals, and to agree with the justice of the Supreme Court. In a careful and exhaustive opinion, Justice Hagner reviewed the evidence, and his conclusions therefrom commend themselves to our judgment. In view of this opinion, it seems unnecessary to recapitulate all the testimony, and we shall content ourselves with stating the salient features thereof.

Mr. Avery was for some 32 years in the employ of the government, and was an enthusiast in the scientific studies which he was pursuing in connection with such service. Prior to the purchase of the lot in controversy, and on September 13, 1882, he had made a will, in which, after giving to his "wife, Lydia T. Avery, if she outlives me, in

trust while she lives, all my real estate and personal property, * * * to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition," he declared:

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exception as I may make hereafter in this will or in codicils annexed thereto, to the board of regents of the Smithsonian Institution, to provide for its safekeeping, and to use the income from it in extending the sciences by publishing," etc.

And again:

"This fund may be called the 'Avery Fund,' or the 'Fund Contributed by Robert S. Avery and His Wife, Lydia T. Avery, for the Extension of the Sciences'; and all publications made with this fund must have a note thereon stating that they have been thus published.

"After the death of my wife, the board of regents of the Smithsonian Institution will be expected to select an executor of this will, and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified."

His wife was 15 or 20 years younger than he, and the expectation of both was that she would outlive him, though in fact she died some 4 years before he did, he living to be 86 years of age. After her death, and on December 20, 1892, he prepared a codicil to the will of 1882, in which he recited that the conveyance of the property in question was made to his wife with his consent, and upon the express understanding and condition that she should make a will in his favor, and that he had, as evidence of this, filed several affidavits of her statements in respect to the matter. Subsequently he executed the will of July 22, 1893, under which this suit was brought. The wills and codicil above referred to furnish indisputable evidence that, prior to the purchase of the real estate in controversy, Mr. Avery intended that all his property, after certain legacies were paid, should go to the Smithsonian Institution, and that he understood that, when the deed of this property was made to his wife, it was upon the agreement described. That the agreement was made is clearly and positively testified to by one witness, Leland P. Shidy, who was associated in the government service with Mr. Avery, was the intimate friend of both Mr. and Mrs. Avery, living in the house with them from time to time during the years from 1873 to her death. * * *

In addition, there was the testimony of several witnesses of repeated conversations with Mrs. Avery, in which she made statements

to the same effect. In a lease of the property made in 1887, Mr Avery was named as the lessor. The receipts for rent given monthly for several years were signed by him alone, and so signed in her presence. There is nothing to contradict or discredit this evidence. While it may be true that no witness but the one was present at the time the agreement was entered into between Mr. and Mrs. Avery, yet his testimony is corroborated in the various ways to which we have referred. There is no arbitrary rule requiring the direct testimony of any particular number of witnesses to the ultimate fact. It is enough that there be a certainty in respect to it, and that certainty may result from an accumulation of direct and indirect evidences. The law is content if, from a perusal of the entire record, the mind is sure that there was a distinct agreement as claimed. That Mr. Avery understood that the agreement was made as stated, the documentary evidence places beyond doubt; that it was in fact made, Mr. Shidy's testimony attests; and that Mrs. Avery understood that it was so made is evident not merely from Mr. Shidy's testimony, but from her statements to many others. The will executed in 1882, and before the purchase of this lot, discloses his intent that all his property, save a few specific bequests, should go to the Smithsonian, and that the fund created thereby should bear his wife's as well as his own name; and the evidence makes it clear that she shared in his desire to make this fund as large as possible. While we agree to the proposition that parol testimony to overthrow the legal effect of conveyances must be clear and satisfactory, yet we think this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts. Even if it were a criminal case, we should not hesitate to hold that the evidence was sufficient to establish the fact beyond a reasonable doubt. It is true, Mr. Avery, in the codicil, speaks of the agreement on the part of Mrs. Avery as one to make a will in his favor, while Mr. Shidy says that the agreement was that she should make a will transferring the property after her death to the Smithsonian; but this slight difference is immaterial, and does not discredit the testimony. The Smithsonian was to be the ultimate beneficiary, and the manner in which this should be accomplished was merely a matter of detail, in respect to which the memory of the witnesses might differ. Indeed, Mr. Shidy does not purport to give the exact language used, but merely states the substance of the agreement.

We pass, therefore, to the further question: If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to

Mrs. Avery under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?

The court of appeals was of the opinion that the agreement on the part of Mrs. Avery created an express trust, which, resting only in parol, was invalid under the statute of frauds. It recognized the doctrine that an implied or resulting trust arises by operation of law whenever one person buying and paying for an estate has the title placed in the name of another, but held that where the title is conveyed to a wife or child, or other person for whom the one paying the purchase money is under an obligation, legal or moral, to provide, no presumption of a trust arises, and that it is incumbent on one who claims the existence of such a trust to establish it by clear, positive, and unequivocal proof, and that this had not been done in the present case. It did not substantially disagree with the trial court on the propositions of law laid down by him, but differed mainly as to the strength and effect of the evidence.

The general proposition is unquestioned that where, upon a purchase of property, the conveyance of the legal title is to one person, while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.

"This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." 1 Perry, Trusts, (4th Ed.) § 126.

The nature of this trust may be shown by parol evidence. This is in express accord with the provisions of the statute of frauds. Comp. St. D. C. 231, §§ 8, 9. The first of these sections requires that all declarations or creations of trust or confidence in respect to real estate shall be manifested and proved by some writing. Section 9 reads:

"Provided, always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been

made; anything hereinbefore contained to the contrary notwithstanding."

There is no statute in force in this District, such as is found in some states, putting an end to implied and resulting trusts. It is true that when the consideration is paid by a husband, and the conveyance made to his wife, there is a presumption that such a conveyance was intended for her benefit; but this is not a presumption of law, but of fact, and can be overthrown by proof of the real intent of the parties.

"Whether a purchase in the name of a wife or child is an advancement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement. Therefore any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption; and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time." 1 Perry, Trusts (4th Ed.) § 147. See, also, 2 Pom. Eq. Jur, § 1041, and cases cited in notes.

This is in accord with the general proposition so often enunciated that the statute of frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in *Wood v. Rabe*, 96 N. Y. 414, 425:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. * * * One is that it will not permit the statute of frauds to be used as an instrument of fraud; and the other, that when a person, through the influence of a confidential relation, acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief."

And in *Haigh v. Kaye*, L. R. 7 Ch. App. Cas. 469, 474:

"The words of Lord Justice Turner, in the case of *Lincoln v. Wright*, 4 De Gex & J. 16, where he said, 'The principle of this court is that the statute of frauds was not made to cover fraud,' express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage

of the statute of frauds to keep another man's property which he has obtained through fraud."

If Mrs. Avery had during her lifetime conveyed this property to her sister and brothers, it would have been a fraudulent breach of trust; and the like result follows if, now that she has died without executing a will, her heirs are permitted to take the property which was conveyed to her, not as an advancement, but on an agreement that it should subsequently pass to this plaintiff.

The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate, by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title,—an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement, and to indicate the disposition which the real owner intended should be made of the property.

In *Robinson v. Leflore*, 59 Miss. 148, 151, it was said:

"If the facts make out a case of resulting trust independently of the agreement, relief will not be denied because of the agreement; it being well settled that an invalid agreement cannot destroy an otherwise good cause of action, and this is no less true of resulting trusts than of other legal rights." *Keller v. Kunkel*, 46 Md. 565.

It may not be amiss to notice a few of the authorities. *Sherman v. Sherman*, 20 D. C. 330, is in point. In that case the husband made an agreement with his wife to buy real estate in her name, and that she should execute a will devising it to him. He bought one piece of real estate in her name, and she made a will so devising it. Subsequently, he, in like manner, bought another piece, and, under the supposition that the will covered this after-acquired property, she made no new will, but died intestate as to that property, and it was ruled that a minor daughter, who inherited the title, held it in trust for him. In *Livingston v. Livingston*, 2 Johns. Ch. 537, it appeared that husband and wife agreed orally that he should purchase a lot in her name, and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seised, which should be sold for that purpose. The husband having executed the agreement upon his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; and it was held that the agreement should be carried into effect, and the lot

which originally belonged to the wife was ordered to be sold, and the husband reimbursed out of the proceeds. In his opinion, the chancellor said (page 539):

"The presumption would undoubtedly be in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of *Kingdon v. Bridges*, 2 Vern. 67; but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In *Finch v. Finch*, 15 Ves. 43, it was held that though, when a purchase is made in the name of a person who does not pay the purchase money, the party paying it is considered in equity as entitled, yet, if the person whose name is used be a child of the purchaser, it is *prima facie* an advancement, but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as a trustee."

Cotton v. Wood, 25 Iowa, 43: Here the facts were that the husband purchased a lot, and had the same conveyed to his wife, under an agreement that she would convey it to him, or to whomsoever he might assign his interest therein, upon his request. The wife died without making any conveyance, and it was held that her husband might maintain a suit to compel a conveyance to him by her heirs, the court saying:

"Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. See *Hill, Trustees*, 91, and authorities cited in notes; 2 Story Eq. Jur. § 1201. But if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded *prima facie* as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payee of the consideration to overcome the presumption in favor of the legal title by sufficient evidence.

"This presumption, though strong, is not conclusive. *Hill, Trustees*, 97, and notes. * * *

We think it clear from these authorities, and many others that might be cited (see 1 White & T. Lead. Cas. Eq. [4th Ed.] pt. 1, p. 314, and following, where the authorities are collated and the question discussed at length), that the doctrine of an implied and resulting trust applies to a case in which the husband advances the purchase price for property which is conveyed to his wife, and that,

though it be true there is a presumption that the conveyance was intended as an advancement for her benefit, yet such presumption is subject to overthrow by proof of an agreement that such was not the purpose of the conveyance. And so the case comes back to the question of fact in respect to which we have already expressed our conclusions, whether there was sufficiently clear and positive evidence that this conveyance to Mrs. Avery was not intended as an advancement, but was made simply for the purpose of convenience, and upon the agreement that this lot, together with other property belonging to Mr. Avery, should pass, after both were dead, to the Smithsonian Institution. * * *

Decree reversed.

MOORE v. CRAWFORD.

130 U. S. 122; 9 Sup. Ct. 447; 32 L. Ed. 878. (1889)

Appellees, the widow and heirs of John Monroe, deceased, filed their bill against Nathaniel D. Moore and Helen Moore, to compel a conveyance of the one undivided sixth part of 160 acres of mineral land in Ontonagon county, Mich., which had been located by Nathaniel D. Moore, under an agreement with James H. McDonald and John McKay that Moore should have a one-third interest in consideration of his services in prospecting for land having iron ore, and selecting and locating that in question. It was upon Moore's application that the patent was issued from the state land-office at Lansing, in January, 1875, to McDonald and McKay, the purchase money being furnished by them and paid over by him. By the testimony of Moore and McKay it was established that Moore was to have a one-third interest, while McDonald admitted that he was to have an interest, but was uncertain whether it was to be one-third or one-fourth. One McIntyre testified that the agreement between Moore, McDonald, and McKay was in writing, and signed in his presence by McDonald and McKay; but he was not sure whether Moore signed it or not. The execution of such an agreement was denied, and the Circuit Court considered McIntyre's testimony too indefinite as to its terms to warrant proceeding upon it. On the 18th day of October, 1875, Moore, who was then unmarried, executed and delivered to John Monroe a deed in fee-simple with

covenants of seisin, against incumbrances, and of general warranty, for an undivided one-sixth interest in said lands, which was duly recorded December 20, 1875. The consideration was \$250, of which Monroe paid \$10 in cash, and for the residue gave his promissory note to Moore, payable one year after its date. Moore informed Monroe at the time that he had arranged with McDonald and McKay for a one-third interest, and that the deed was then probably made out. Pursuant to their agreement, McDonald and McKay, some time in 1875, executed a deed to Moore for a one-third interest in the land, which was deposited with one Viele, to be delivered to Moore when McDonald and McKay should direct. McDonald testified that Moore was indebted to him, and he wished delivery delayed until the debt was arranged and satisfied, which was finally effected in 1877. Moore does not seem to have known about the execution of this deed, and it appears to have been subsequently lost. McDonald and McKay never denied Moore's right to his interest, but always admitted it, and McDonald testifies that it was understood that Moore should have the interest any time he called for it. In December, 1880, McDonald and McKay conveyed an undivided one-third interest in the land to Helen Moore, wife of N. D. Moore, who requested the conveyance to be made to his wife for the express purpose, as he admitted, of defeating the deed he had previously given to Monroe for one-sixth of the land. Monroe died intestate in Colorado in August, 1878, and Moore, knowing that his deed to Monroe had been recorded, expected Mrs. Monroe would make trouble. No consideration passed when McDonald and McKay executed and delivered this conveyance, and Mrs. Moore was not present when it was executed, but she had been informed by her husband that it was to be made to her, and had full notice of his deed to Monroe. Since the conveyance to Helen Moore, N. D. Moore has substantially managed the property as if it were his own. Further reference to the pleadings and evidence is made in the opinion. Hearing having been had upon bill as amended, answer, replication, and proofs, the Circuit Court, Judge Sage presiding, delivered its opinion, which is reported in 28 Fed. Rep. 824, and decree was thereupon entered for conveyance to complainants as prayed, and for rents and profits from the date of the filing of the bill, less the amount due on the \$240 note, from which decree this appeal was prosecuted. Mrs. Moore having died pending the appeal, Nathaniel D. Moore, Jr., her sole heir at law, and John McKay, administrator of her estate, were made co-appellants with Nathaniel D. Moore.

MR. CHIEF JUSTICE FULLER, after stating the facts as above, delivered the opinion of the court.

Had the conveyance of McDonald and McKay, lodged in Viele's hands, been actually delivered to Moore, no question would have arisen; but, that deed having been suppressed or lost, when Moore subsequently induced McDonald and McKay to convey to his wife, for the avowed purpose of avoiding the deed he had given Morroe, Moore's wife being fully advised of the purpose, and paying no consideration for the conveyance, the transaction must be regarded in equity as if McDonald and McKay had conveyed to Moore, and Moore had conveyed to his wife, she holding in trust for Monroe and his heirs one-half of the interest conveyed to her, namely, one-sixth of the whole. "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." 1 Story, Eq. Jur. 187. Whenever the legal title to property is obtained through means or under circumstances "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust." 2 Pom. Eq. Jur. 1053.

In *Huxley v. Rice*, 40 Mich. 82, it is said: "It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party deriving title under it will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute of frauds by a party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his

injustice or its effects." The fraud of which Moore was guilty was in preventing the conveyance to himself, which would have inured to Monroe, and in obtaining it to his wife, so as to reap the benefit which belonged to his grantee. Mrs. Moore stands in her husband's shoes, and, by accepting with knowledge, is to be treated as a party to his fraud and profiting by it, or, as a mere volunteer, assisting him to perpetrate the fraud and to profit by it, and is hence to be held, as he could have been, a trustee *ex maleficio*. Nor do we see that the statute of frauds can be invoked as a defense. The fact that McDonald and McKay could not have been compelled to convey to Moore because of the want of written evidence of their agreement to do so does not entitle Mrs. Moore to object that they were not legally bound to do what they were morally, they having kept their faith with Moore by conveying under his directions. If McDonald and McKay had violated their agreement with Moore, and in furtherance of such violation had conveyed to a stranger, such grantee might have defended, even though cognizant of the verbal agreement of McDonald and McKay to convey to Moore; but McDonald and McKay never repudiated their obligation to Moore, and conveyed as he directed, thereby, so far as he was concerned, carrying out the trust upon which they held one-third of the land. There is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party morally, but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law, have been enforced by action." *Newman v. Nellis*, 97 N. Y. 285, 291; *Patton v. Chamberlain*, 44 Mich. 5, 5 N. W. Rep. 1037; *Barber v. Milner*, 43 Mich. 248, 5 N. W. Rep. 92. Mrs. Moore did not take as a stranger would have taken, but took in execution of the agreement with her husband. Clearly, then, she cannot be permitted to set up a statutory defense personal to McDonald and McKay, who could not, in fulfilling their agreement, transfer an excuse for non-fulfillment. It is undoubtedly the rule that the breach of a parol promise or trust as to an interest in land does not constitute such fraud as will take a case out of the statute (*Montacute v. Maxwell*, 1 P. Wms. 620; *Rogers v. Simons*, 55 Ill. 76; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. Rep. 506;) but here McDonald and McKay did not fail to perform their promise, and, when they performed, their grantee took one-half of the one-third, charged with a trust to hold it for Monroe by reason of the

deed of Moore to Monroe, under the covenants of which Moore was equitably bound, when he acquired the title, to hold it for Monroe's benefit. That deed contained a general covenant of warranty.

In *Irvine v. Irvine*, 9 Wall. 617, 625, Mr. Justice Strong, speaking for the court, said: "It is a general rule that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee, on the principle of estoppel." And in *Van Rensselaer v. Kearney*, 11 How. 297, it was pointed out that it is not always necessary that a deed should contain covenants of warranty to operate by way of estoppel upon the grantor from setting up the after-acquired interest against his grantee, the court saying (page 325) "that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies." The rule is thus stated in *Smith v. Williams*, 44 Mich. 242, 6 N. W. Rep. 662: "It is not disputed that a deed with covenants of seisin and title would be effectual to give the grantee the benefit of an after-acquired title, under the doctrine of estoppel; but these covenants were absent from the deed in question, and the covenant of quiet enjoyment, it is said, would not have a like effect. No reason is given for any such distinction, and it is not recognized by the authorities. When one assumes, by his deed, to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given." Conceding that a covenant of general warranty operates by way of

rebutter to preclude the grantor and his heirs from setting up an after-acquired title, rather than to actually transfer the new estate itself, the subsequent acquisition creates an equity for a conveyance in order to make the prior deed effectual. *Noel v. Bewley*, 3 Sim. 103, 116; *Smith v. Baker*, 1 Younge & C. Ch. 223. * * *

Treating his deed as a covenant to convey, Moore would have been precluded from denying the title if the deed of McDonald and McKay had been made directly to him; and if, this being so, he could not call in question his own grant, he could not, by interposing a third person, taking without consideration, and to enable the fraud to be carried into effect, in that way defeat it. It was the duty of Moore to take the conveyance for the benefit of Monroe, and Monroe had the right to the enforcement of that duty in equity, in view of the fraudulent device by which Moore attempted to avoid its discharge. The fraud was of such character as enables a court of equity to decree the relief as against the covenantor, not only under his own name, but under the name of his wife; and it will not do, under such circumstances, to say that Monroe is remitted to an action for damages for breach of the covenant of warranty, because Moore not only had no title at the time but never afterwards acquired title; for when the conveyance was made to Mrs. Moore it was, as we have held, as if the title had been acquired by Moore himself. Nor is this a case wherein specific performance of the covenant of warranty is sought upon failure of title in the absence of fraud. It is insisted that, if the deed be regarded as a contract to convey, while in such case the heir would ordinarily be entitled to a conveyance from the vendor, yet if the vendor had no title, or if the vendee was not bound by the contract at the time of his death, the heir is not so entitled; but it appears from this record that Moore could have obtained the title in Monroe's life-time, and the latter could have been compelled to perform on his part, so that the contract was binding at the time of Monroe's death, and his heirs had the right to compel specific performance. The vendor, therefore, would not be liable in one action to the estate, and in another to the heirs.

Monroe died in August, 1878. Moore and McDonald had settled in 1877 the matters which McDonald had given as reasons for not conveying, or for suspending the delivery of the deed placed in the hands of Viele, and McDonald was then ready to convey to Moore, which McKay had always been. Moore was able to perform before

Monroe's death, and the right to compel performance which Monroe had his heirs can enforce. * * *

NEVES ET AL. v. SCOTT ET AL.

9 *Howard* (U. S.) 196; 13 L. Ed. 102. (1850)

MR. JUSTICE NELSON delivered the opinion of the court.

* * * But, without pursuing this branch of the case farther, or placing our decision upon it, there is another ground, unembarrassed by conflicting authorities or refined distinctions, which the court are of opinion is decisive of the questions involved in favor of the complainants. And that is, that the deed in question is a marriage settlement, complete in itself, an executed trust, which requires only to be obeyed, and fulfilled by those standing in the relation of trustees, for the benefit of the *cestui que trusts*, according to the provisions of the settlement.

The defendants are not called upon to make a settlement of the estate, under the direction of the court, from imperfect and incomplete marriage articles, and which might or might not be subject to the objections stated.

The settlement has been made by the parties themselves; and the only question is, whether the defendants shall be compelled to carry it into execution.

The distinction between trusts executed and executory is this: a trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust, where the directions are incomplete, and are rather minutes, or instructions for the settlement. (1 Mad. Ch. 558; 2 Story's Eq. § 983.)

The former, as observed by Lord Eldon, in one sense of the word, is a trust executory; that is, he observes, if A. B. is a trustee for C. D., or for C. D. and others that, in this sense, is executory, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance, and execute the trust: but these are cases where the testator has clearly decided what the trust is to be; and as equity follows the law where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same whether the estate is equitable or legal. (*Jervois v. The Duke of Northumberland*, 1 Jac. & Walk. 550.) The remarks were made for a differ-

ent purpose than the one in view here; but they afford a clear illustration of the distinction stated.

Now, the only plausible ground for contending that this instrument imports but mere articles, as contradistinguished from a marriage settlement, is, that in the caption it begins, "Articles of agreement," &c., but it is to be observed, that the deed is drawn up somewhat unskilfully, and without much regard to form; and that the draughtsman had not probably in his mind, if even he was aware of, the technical or legal distinction between the two instruments; and besides, and what is more material to the purpose, we must look to the body of the instrument, its provisions and tenor, and to the intent of the parties, as collected from the whole, in order to determine its character and effect.

Courts will endeavor, as much as possible, to give effect to marriage agreements according to the understanding of the parties; and where they evidently considered the instrument in the light of a final and complete settlement, not contemplating any future act, it will be so regarded; and in order to effectuate their intent, one part of the instrument even will be taken as a complete settlement of the estate comprised in it, and another part as mere articles.

In the case before us, every portion of the estate is definitely settled, both in respect to the amount of the interest, and the particular persons who are to take; the limitations leave no part undisposed of; estates for life, and in remainder in the property, are limited with all the formality required to enable a court of equity to carry the trust into execution, according to the intent of the settlers. There is nothing in the instrument contemplating any further act to be done by them.

The practical construction, also, accords with that derived from their language. The estate was possessed and enjoyed under it, by both or one of them, from 1810 to 1844, a period of thirty-four years.

If a third person had been interposed, as trustee of the estates, with the limitation as found in the instrument, no one could, for a moment, have doubted but that the settlement would have been final and complete; and yet it has long been settled, that equal effect will be given to it in equity, when made only between the parties themselves; each one will be regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement. (2 Story's Equity, 1380; Fonbl., book 1, ch. 2, 6, note n; 2 Kent's Com. 162, 163; 9 Ves. 375, 383; 3 Johns.

Ch. 540.) There can be no objection to the execution of the trust on this ground.

It appears from the bill, that portions of the estate in the possession of the defendants were acquired by the parties to the settlement, subsequent to its execution, and it is supposed that this consideration is material in determining its character; and that if it should be regraded as a settlement, and not mere articles, these subsequent acquisitions would not be bound by it. But this is a mistake.

The instrument provides for subsequently acquired property by either of the parties, as well as the present, and in such cases there is no doubt but that it follows the limitations of the settlement, the same as the property then in possession. (10 Ves. 574, 579; 9 ib. 95, 96; 7 ib. 294; 6 ib. 403, note, Boston ed.).

Looking, then, at the instrument as complete in its directions and limitations, in the settlement of the estate, and as presenting the case of an executed trust, the difficulty set up against the complainants when claiming under marriage articles disappears, for, being the beneficial owners, and vested with the equitable title, a court of equity will interpose, and compel the trustee, or any one standing in that relation to the estate, to vest them with the legal title. * * *

JACKSON v. DELANCY.

13 Johns (N. Y.) 536; 7 Am. Dec. 403. (1816)

William Alexander, commonly called Lord Sterling, executed to Ann Waddell, a mortgage dated Dec. 20, 1770, on the lands in controversy and other lands in the province of New York. In 1771 Ann Waddell obtained judgment against him upon a portion of the debt secured by the mortgage. She died in 1773, leaving a will directing that her estate "be turned into money and equally distributed among her five children," who were to be tenants in common of the realty until such sale and distribution be made. The executors revived the judgment against the heirs of Lord Sterling who died in 1783, and the lands were sold at sheriff's sale to John Taylor.

By the will of Lord Sterling, dated in 1780, all his real and personal estate was devised to his wife, and she died in 1805, having devised all her estate to trustees in trust for her daughter, Catherine

for life with remainder to her children. The trustees under this will are the lessors of the plaintiff.

John Taylor was the husband of one of the daughters of Ann Waddell and had acquired the interests of three other of her children. When the mortgage was given by Lord Sterling he had several tenants in possession all of whom in 1790 attorned to Taylor and since have held under him and his heirs.

The court below gave judgment for the defendants, heirs of Taylor.

KENT Chancellor. The premises in question were originally owned by Lord Stirling, and the lessors of the plaintiff claim title under him. The defendants set up title under a mortgage which Lord Stirling executed to Ann Waddell, in 1771. A part of the debt secured by the mortgage was prosecuted at law, to judgment and execution, and John Taylor, under whom the defendants held, took, as purchaser, a sheriff's deed of the premises under the execution; and he was also at the same time entitled under the will of Ann Waddell to two-fifths of her estate. If Taylor acquired a title under the sheriff's deed, or was entitled to the land under the will, the lessors of the plaintiff cannot recover. There is nothing in the case to warrant an inference that the mortgage has been satisfied or discharged; and in respect to the questions arising under the special verdict, it is to be considered as a subsisting incumbrance.

I am induced to think that the title set up by the defendants under the sheriff's deed cannot avail them.

* * * This brings us to the last and main question in the case, and that is, can Taylor's entry be protected under the mortgage from Lord Stirling to Mrs. Waddell? Every other point of defense having failed, the whole cause turns upon the solution of this interesting question.

The will of Mrs. Waddell sets out with a declaration that she disposes of her whole estate, real and personal; and after some specific legacies, she directs her executors to collect all her outstanding debts; and that all the rest of her estate in Hardenberg's patent and elsewhere, whatsoever and wheresoever, be turned by them into money, and be equally distributed among her five children, share and share alike, "who are to be tenants in common in fee of the realty, until such sale and distribution be made." It is very clear to me from this will that Mrs. Waddell did not intend to die intestate, as to any part of her estate. She did not intend that her eldest son, William, and whom she evidently, in the same will, rebukes for his disobedi-

ence, should inherit any part of her estate whatsoever, as heir at law, in preference or in exclusion of her other children. She meant that the mortgage debt of Lord Stirling should go as the rest of her estate went. She probably knew nothing of the distinction between a beneficial interest in the mortgage debt, and a dry, technical, legal estate in the mortgaged premises. If the distinction was known, to her, she never intended that her eldest son should avail himself of it. If the mortgage was personal estate, she meant that the executors should take and distribute it; and if it was real estate, capable of enjoyment, and of being devised as such, she meant it to go as part of the realty to her five children equally, as tenants in common. There is no doubt in my mind that this is the fair and obvious intention of the will; for the language is plain and unambiguous, and there is no provision inconsistent with this intention.

We are, however, here met with a difficulty which is supposed to be insuperable, and on which the main stress of the argument on the part of the plaintiff was laid. It is admitted that the words of the will are sufficient to pass to the five children all the real estate which Mrs. Waddell held in her own right; but it is said to be a settled rule of law in the construction of wills, that general words, such as lands, tenements and hereditaments, the realty, or other words particularly appropriated to real estate, will not carry an interest in land which the testator holds as mortgagee or trustee; that unless the will specially refers to such an interest, it will not pass by the usual devise of the real estate; and that though, strictly and technically speaking, the mortgagee has a legal estate in fee in the mortgaged premises, yet that estate must descend as undeviseed property to the heir at law, rather than pass with the rest of the estate by such general words.

If this be the rule of law, whatever we may think of it, we are bound to obey it. On this point I fully agree with the learned counsel for the plaintiff. No man feels more strongly than I do the duty incumbent on every member of this court to declare the law truly and strictly in all our judicial decisions. We sit here, not as a branch of the legislature, but as a court of justice, and we must not in any case set up the authority of our own "right reason," as paramount to the law which we are sworn to administer. But it is unnecessary to press these reflections. I have satisfied myself, and perhaps I may be able to satisfy others, that the rule of law is not as was stated on the part of the plaintiff, but the rule is that the same words in a

will which will carry any other estate, will carry, also, the legal estate held in trust under a mortgage.

The latter is, upon the whole, the most convenient rule, though I admit it cannot be very material as it respects the interest of parties, which way the rule is settled, for whoever takes a trust estate, whether it be the heir by descent, or the devisee by will, he must take it as trustee merely, and is equally responsible in the one capacity as the other. But if the public interest is not much concerned in settling the rule, there is the less reason for refusing to construe the words of will according to their ordinary meaning. Lord Rosslyn has said, 5 Ves. 339, that it would be more convenient that trust estates should pass by general words, because it is more convenient for those who are concerned in the trust to find the devisee than the heir; and if this be the case in England the convenience is vastly increased with us; because in England the eldest male is alone the heir at law, but with us all the children, male and female, inherit together. And if the beneficial interest in the mortgage debt is given to the devisee, the inducement is still stronger to give him the legal estate, for why should the legal and beneficial interest in the mortgage premises be unnecessarily separated? What possible use would there be in allowing the legal estate in the mortgage to descend in this case to William Waddell, the heir at law, when he would as heir be only a mere naked trustee for those who were entitled to the beneficial interest in the mortgage debt under the will? It would be far better, on the score of convenience and simplicity, to let the legal and equitable interest under the mortgage go together, as they in fact existed together in the person of Mrs. Waddell at the time of her death.

The rule, as now settled, is this, that trust estates will pass by the usual general words in a will passing other estates, unless it is to be collected from the expressions in the will, or the purposes and objects of the testator, that it was his intention they should not pass. This was the rule as declared by Lord Ch. Eldon, in *Braybrooke v. Inskip*, 8 Ves. 407, after much examination and reflection. In that case A. held land in trust, and by will devised all his real and personal estate whatsoever, etc., to his wife, and it was held by the master of the rolls, and afterwards by the lord chancellor, that the legal estate in the trustee passed by this general devise. The lord chancellor said this was a question of intention of the testator, and the weight of convenience was in favor of the rule. The will was large enough, and there were no expressions in it authorizing a narrower construc-

tion, and no purpose inconsistent with an intention to pass the trust estate to the devisee. He said there was no case establishing a different rule; and that, if there was any such case, he would abide by it. The rule according to the old cases unquestionably was, that a trust estate would pass by general words.

This is the final decision in the English courts, on the very point which has been raised and discussed in this place; and after the decided opinion of so laborious and able a lawyer as Lord Eldon, we may well doubt whether the learned counsel for the plaintiffs have not been mistaken in their apprehension of the rule of law. It is admitted, on all hands, that a mortgagee holds the mortgaged lands in trust; and when it is said that a devise of real property will ordinarily pass a trust estate, all the cases consider it as applying as well to a mortgagee as to any other trustee; and indeed, it applies the stronger to that case when we find that the devise does actually pass the beneficial interest in the mortgage debt.

The case of *Roe ex dem. Reade v. Reade*, 8 T. R. 118, in the K. B. declares the same rule. A., having estates of his own, and having another estate which he held as a mere naked trustee, without any interest, devised all his estate, whatsoever and wheresoever, after payment of debts and legacies. The question was here between the heir and devisee, which of them took the trust estate, and the K. B. put it entirely on the ground of intention. The general words seem, both by the counsel and the court, to have been admitted to be sufficient to pass the trust estate, but as the testator had here charged all his lands devised with the payment of debts and legacies, it was decisive evidence that he did not intend to pass the trust estate by that will, because he had no right to charge it with such payment; and as the intention in this case was manifest, for that reason, and that reason only, the trust estate was held not to pass. So, in another case, *Ex parte Morgan*, 10 Ves. 101, Lord Eldon held, that where a mortgagee had devised all his real estate charged with an annuity, it could not be considered as his intention to pass the mortgage estate, because that estate was not his own. He only held it in trust for a special purpose, and he had no right to charge it with an annuity.

Here, then, we have the decisions of the courts of law and equity in England, uniting in the rule as I have stated it; and if we go back, as Lord Eldon did, to the old cases prior to the revolution, and which

are to be received strictly as authority, we shall find them containing and expounding the same doctrine. * * *

I have thus finished a review of all the material cases on the subject, and if the court have had the patience to attend to this dry detail, I presume they must be satisfied that there is no technical rule of law to withstand the intention of the will. And when Mrs. Waddell directed that all the rest of her estate in Hardenbergh's patent and elsewhere, whatsoever and wheresoever; should be turned into money and distributed among her five children, who should be tenants in common in fee of the realty, until such sale and distribution be made, she intended that her legal and beneficial interest in the mortgage debt and premises should pass with the rest of her estate. It follows then, of course, that John Taylor was authorized to enter under the mortgage in right of his wife, and of Mrs. Miller, two of the daughters of Ann Waddell, and that the notion of an illegal and fraudulent attornment to Taylor is totally without foundation. We may consider his possession as the possession of all the claimants under the will. * * *

Judgment affirmed.

RUSSELL and another v. ALLEN, EX'X, and others.

107 U. S. 163; 20 Sup. Ct. 327; 27 L. Ed. 397. (1883)

GRAY, J. This is a bill in equity, filed on the sixteenth of April, 1878, by two of the heirs at law and next of kin of William Russell, of St. Louis, against Thomas Allen, to establish a trust in favor of Russell's heirs at law and next of kin, and for an account.

The bill alleges that on the nineteenth of July, 1855, William Russell and John S. Horner executed four indentures of trust, by each of which Russell, in consideration of one dollar paid, "and for divers other good and valuable considerations, but chiefly for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," granted and conveyed to Horner, his executors and administrators or successors, in trust forever, certain lands and personal property in the State of Arkansas, to have and to hold the same unto him, his executors, administrators, and successors, in trust, "to and for the following uses and purposes, to-wit, the said property

is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri;" and empowered and directed him and them to sell the same as soon as conveniently might be, and to account for and pay over the proceeds yearly or oftener, deducting the reasonable expenses of executing the trust, "to Thomas Allen, president of the board of trustees of the said Russell Institute at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof;" and Horner's trust to be brought to a close and the net proceeds paid over as soon as conveniently might be, and if not concluded within 10 years the property remaining undisposed of to be sold by public auction and the proceeds paid over as before required. In each of the four indentures reference was made to the three others, and it was "declared that all of said conveyances, including this, are made to one and the same person for one and the same use and purpose, and that the same are and are to be deemed and taken and accounted for as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all of the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri." After this clause, in one of the indentures, were added the words "represented by their president aforesaid." Each indenture contained a covenant by Horner "faithfully to perform the trust hereby created."

The bill further alleges that Horner, in the execution of his trust, has converted a large portion of the property into money, has paid over to Allen the sum of about \$50,000, and has conveyed and transferred to Allen the property remaining unsold, and that Allen holds and controls the whole fund, and has never applied to any court for aid in the disposition and application thereof, and has in no way used or recognized the fund as held by him in trust for the uses declared by Russell.

The bill further alleges that there was not at the time of the execution of the indentures aforesaid, nor before or since, any such educational institution as was referred to therein; that at the time of such execution Russell was from paralysis infirm in body and weak in mind, and that, while he then manifestly proposed to found such an institution, yet in his increasing incapacity of body and mind during the short period that intervened between that time and his

death he failed to accomplish his philanthropic purpose; that he died in 1856, without ever having founded such an institution, or delegated to Horner or to Allen, or to any other person or corporation, authority to organize a Russell Institute, and that no such authority has hitherto been exercised or claimed by any person or corporation, and there is and has been no donee capable of receiving, holding, and administering the trust fund created by the indentures; that the beneficiaries of the trust, so far as can be determined by the terms of the indentures, are uncertain and indefinite, and the trust is invalid, and, there being no debts outstanding against Russell's estate, the trust fund belongs to his next of kin.

To this bill Allen filed a general demurrer, which was sustained and the bill dismissed. 5 Dill. 235. The plaintiffs appealed to this court. Pending the appeal, Allen has died, and his executors have been made parties in his stead.

The deeds of gift state that they are made "chiefly for the purpose of founding an institution for the education of youth in St. Louis county, Missouri;" they convey the property to Horner and his successors in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri;" they direct him to sell the property and account for and pay over the proceeds "to Thomas Allen, president of the board of trustees of the said Russell Institute of St. Louis, Missouri," whose receipt shall be a full discharge of Horner; and they end by declaring that all these conveyances shall be deemed, taken and accounted for as one trust, and that it is the intention of the donor to convey the property included in all of them "to and for the benefit of the said Russell Institute of St. Louis, Missouri," to which one of the deed adds, "represented by their president as aforesaid."

The donor thus clearly manifests his purpose to found an institution for the education of youth in St. Louis, to be called by his name; and he executes this purpose by conveying the property to Horner in trust, to hold and convert into money, and pay that money to the officers of the institute when incorporated and a board of trustees appointed by the trustees or their successors; such a bequest being valid the board of trustees, and the mention, at the close of one of the deeds, of the institute as represented by its president as aforesaid, clearly show that the fund is not to be paid to Allen individually; and while they imply the donor's wish that Allen should be the first president of the board of trustees of the institute, they do not make his appointment to and acceptance of that office a condition of the va-

lidity of the gift or of the carrying out of the donor's charitable purpose. The terms of the deeds clearly show that the donor did not contemplate or intend doing any further act to perfect his gift. It is not pretended that the allegations in the bill as to his weakness of body and mind amount to an allegation of insanity, and they are irrelevant and immaterial.

The principal grounds upon which the plaintiffs seek to maintain their bill are that the deeds create a perpetuity; that the uses declared are not charitable; and that, if the uses are charitable, there are no ascertained beneficiaries, and no donee capable of assuming and administering the trust, and the uses are too indefinite to be specifically executed by a court of chancery. But these positions, as applied to the facts of the case, are inconsistent with the fundamental principles of the law of charitable uses, as established by the decisions of this and other courts exercising the ordinary jurisdiction in equity.

By the law of England from before the statute of 43 Eliz. c. 4, and by the law of this country at the present day, (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York,) trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of a charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead.

The previous adjudications of this court upon the subject of charitable uses go far towards determining the question presented in this case. As the extent and effect of these adjudications have hardly

been appreciated, it will be convenient to state the substance of them.

The case of *Baptist Association v. Hart*, 4 Wheat. 1, in which a bequest by a citizen of Virginia "to the Baptist Association that for ordinary meets at Philadelphia annually," as "a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry," was declared void, was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would sustain the bequest, had its origin in the statute of Elizabeth, which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous. *Vidal v. Girard*, 2 How. 127; *Perin v. Carey*, 24 How. 465; *Ould v. Washington Hospital*, 95 U. S. 303. And the only cases in which this court has followed the decision in *Baptist Association v. Hart* have, like it, arisen in the State of Virginia, by the decisions of whose highest courts charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts. *Wheeler v. Smith*, 9 How. 55; *Kain v. Gibboney*, 101 U. S. 362.

In *Beatty v. Kurtz*, 2 Pet. 566, the owners of a tract of land (afterwards part of Georgetown) laid it out as a town, and made and recorded a plan of it, marking one lot as "for the Lutheran church;" and the Lutherans of the town, a voluntary society not incorporated, erected and used a building upon this lot as a church for public worship, and fenced in and used the land as a church-yard, for the burial of others as well as Lutherans, for 50 years. Upon these facts it was held that the bill of rights of Maryland, affirming the validity of any sale, gift, lease, or devise of land, not exceeding two acres, for a church and burying-ground, recognized, to this extent at least, the doctrine of charitable uses, under which no specific grantee or trustee was necessary; that this land had been dedicated to a charitable and pious use, beneficial to the inhabitants generally, which might at all times have been enforced through the intervention of the government as *paterfamilias*, by its attorney general or other law officer; and that a committee of the society might maintain a bill in equity to restrain by injunction the heirs of the original owners from disturbing that use.

In *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, a citizen of New York devised land to the chancellor of the state, the mayor of the city, and others, designating them all by their official titles only, and to their

respective successors, in trust out of the rents and profits to build a hospital for aged, decrepit, and worn-out sailors, as soon as the trustees should judge that the proceeds would support 50 such sailors, and to maintain the hospital and support sailors therein forever; and further declared it to be his will and intention that if this could not be legally done without an act of incorporation, the trustees should apply to the legislature for such an act, and that the property should at all events be forever appropriated to the above uses and purposes. An act incorporating the trustees was passed and the hospital was established. A majority of the court held that the trustees took personally and not in their official capacities, and that upon their incorporation the legal title vested by way of executory devise in the corporation as against the heirs at law; and the dissenting judges differed only as to the legal title, and not as to the validity of the charitable trust.

In *McDonogh v. Murdoch*, 15 How. 367, a citizen of Louisiana, declaring his chief object to be the education of the poor of the cities of New Orleans and Baltimore, made a devise and bequest to the two cities, one-half to each, the income to be applied by boards of managers, who should be appointed by either city, but whose powers and duties he defined, and who should obtain acts of incorporation, if necessary, for the education of the poor and other charitable purposes in various ways specified. And in case the two cities should combine together and knowingly and willfully violate the conditions, then he gave the whole property to the States of Louisiana and Maryland, in equal halves, "for the purpose of educating the poor of said states under such a general system of education as their respective legislatures shall establish by law." The court held that the devise to the cities was valid, and that the testator's directions as to the management of the income "must be regarded as subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity;" and expressed the opinion that the failure of the devise to the cities would not have benefited the heirs at law, for in that event the limitation over to the States of Louisiana and Maryland would have been operative. 15 How. 404, 415.

In *Fontain v. Ravenel*, 17 How. 369, a testator, residing at the time of his death in Pennsylvania, appointed his wife and three others to be executors of his will, and authorized his executors, or the survivor of them, after the death of his wife, to dispose of the residue of

his estate "for the use of such charitable institutions in Pennsylvania or South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." In that case, the testator had not himself defined the nature of the charitable uses, nor authorized any one but his executors to designate them; and the point decided was that, they having all died without doing so, the Circuit Court of the United States for the district of Pennsylvania could not sustain a bill to establish them, filed by charitable institutions in Pennsylvania and South Carolina in the name of the administrator *de bonis non* and next of kin of the testator. The question there was, whether the authority of a court of chancery, under such circumstances, belonged to its ordinary jurisdiction over trusts, or to its prerogative power under the sign manual of the crown, which last has never been introduced into this country. See *Boyle, Charities*, 238, 239; *Jackson v. Phillips*, 14 Allen, 539, 576, 588. No question of the validity of the gift as against the next of kin was presented; and even Chief Justice Taney, who, differing from the rest of the court, alone asserted that "if the object to be benefited is so indefinite and so vaguely described that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity," distinctly admitted that a suit by an heir or representative of the testator to recover property or money bequeathed to a charity could not be maintained in a court of the United States if the bequest was valid by the law of the state. 17 How. 395, 396. Accordingly, in *Lorings v. Marsh*, 6 Wall. 337, the court dismissed a bill by the next of kin to set aside a bequest by a citizen of Massachusetts "in trust for the benefit of the poor," by means of such incorporated charitable institutions as should be designated by three persons appointed by the trustees or their successors; such a bequest being valid under the law of Massachusetts as habitually administered in her courts.

In *U. S. v. Fox*, 94 U. S. 315, this court, affirming the judgment of the Court of Appeals of New York in 52 N. Y. 530, held, a devise of land in New York to the United States, for the purpose of assisting to discharge the debt contracted by the war for the suppression of the rebellion, to be invalid, solely because by the law of New York, as declared by recent decisions of the Court of Appeals, none but a natural person, or a corporation created by that state with authority to

take by devise, could be a devisee of land in that state. Where not prohibited by statute, a devise or bequest for such a purpose is a good charitable gift. *Nightingale v. Goulburn*, 5 Hare, 484, and 2 Phil. 594; *Dickson v. U. S.* 125 Mass. 311.

In *Ould v. Washington Hospital*, 95 U. S. 303, a citizen of Washington devised land in the District of Columbia to two persons named, in trust to hold it "as and for a site for the erection of a hospital for foundlings," to be built by a corporation to be established by act of congress and approved by the trustees or their successors, and, upon such incorporation, to convey the land to the corporation in fee. It was contended for the heirs at law that the devise was void, because it was to a corporation to be established in the future, and might not take effect within the rule against perpetuities, and because of the uncertainty of the beneficiaries; and reference was made to the Maryland statute of wills of 1798, still in force in the District of Columbia, providing that no will should "be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the state," and to a series of decisions in Maryland, holding that the statute of Elizabeth was not in force in that state, and that charitable uses were there governed by the same rules as private trusts. But those decisions having been made since the separation of the District of Columbia from the State of Maryland, the court held that the case must be determined upon general principles of jurisprudence, and that the devise was valid.

The objection to the validity of the gift before us, as tending to create a perpetuity, is fully met by the cases of *Inglis v. Sailors' Snug Harbor*, *McDonogh v. Murdoch*, and *Ould v. Washington Hospital*, above cited, which clearly show that a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and 21 years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person. Those cases are in accord with English decisions of the highest authority, of which it is sufficient to refer to the leading case of *Downing College*, reported under the name of *Atty. Gen. v. Downing* in *Wilmot*, 1 Dickens, 414, and *Ambler*, 550, 571, and under the name of *Atty. Gen. v. Bowyer* in 3 Ves. 714, 5 Ves. 300, and 8 Ves. 256; and to the recent case of

Chamberlayne v. Brockett, L. R. 8 Ch. 206. See, also, Saunderson v. White, 18 Pick. 328, 336; Odell v. Odell, 10 Allen, 1.

That the gift is for a charitable use cannot be doubted. All gifts for the promotion of education are charitable, in the legal sense. The Smithsonian Institution owes its existence to a bequest of James Smithson, an Englishman, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men." See Acts of Congress of 1st July, 1836, c. 252; 10th August, 1846, c. 178. This was held by Lord Langdale, master of the rolls, in *U. S. v. Drummond*, decided in 1838, to be a good charitable bequest. The decision on this point is not contained in the regular reports, but appears by the letters of Mr. Rush, then minister to England, (printed in the Documents relating to the Origin and History of the Smithsonian Institution, published by the institution in 1879), to have been made after full argument in behalf of the United States by Mr. Pemberton (afterwards Mr. Pemberton Leigh and Lord Kingsdown) and on deliberate consideration by the master of the rolls. History of Smithsonian Institution, 15, 19, 20, 56, 58, 62. And it was cited as authoritative in *Whicker v. Hume*, 7 H. L. Cas. 124, 141, 155, in which the house of lords held that a bequest in trust to be applied, in the discretion of the trustees, "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit," was a valid charitable bequest, and not void for uncertainty.

"Schools of learning, free schools, and scholars in universities," are among the charities enumerated in the statute of Elizabeth; and no trusts have been more constantly and uniformly upheld as charitable than those for the establishment or support of schools and colleges. *Perry, Trusts*, § 700. That the gift "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," to be managed by a board of trustees, is sufficiently definite, is shown by the decisions of this court in *Perin v. Carey*, and *Ould v. Washington Hospital*, above cited, as well as by that of the house of lords in *Dundee Magistrates v. Morris*, 3 Macq. 134.

The law of Missouri, as declared by the Supreme Court of that state, sustained the validity of this gift. In *Chalmers v. St. Louis*, 29 Mo. 543, a devise and bequest to the city of St. Louis, in trust "to be and constitute a fund to furnish relief to all poor emigrants and

travelers coming to St. Louis on their way *bona fide* to settle in the west, which was objected to for indefiniteness in the object, as well as for want of capacity in the trustee to take, was held to be valid. And in *Schmidt v. Hess*, 60 Mo. 591, a grant of a parcel of land to the Lutheran church for a burial-ground was held to be a valid charitable gift, which equity would execute by compelling a conveyance to the trustees of a church which was proved to be the church intended by the testator, although it was not incorporated at the time of the gift. We have been referred to nothing having any tendency to show that the law of Arkansas, in which, the lands granted lie, is different.

The money paid and the lands conveyed by Horner to Allen stand charged in the hands of Allen and his executors with the same charitable trust to which they were subject in the hands of Horner.

Steps to organize such an institution as is described in the deeds may be taken either by the attorney general, or other public officer of the state, or by individuals. Whenever an institute for the education of youth in St. Louis shall have been incorporated and shall claim the property, it will then be a matter for judicial determination in the proper tribunal whether it meets the requirements of the gift. The only question now presented is of the validity of the gift as against the donor's heirs at law and next of kin.

Decree affirmed.

HOPKINS v. GRIMSHAW.

165 U. S. 342; 17 Sup. Ct. 403; 41 L. Ed. 739. (1897)

MR. JUSTICE GRAY delivered the opinion of the court.

Stephney Forrest, in 1845, purchased a parcel of land in Washington, and conveyed it to three persons, "trustees for the Union Beneficial Society of Washington City," *habendum* to them "and their successors in office forever, for the sole use and benefit of the Union Beneficial Society of the City of Washington as aforesaid, for a burial ground, and for no other purpose whatever." Forrest died in 1855, and all three trustees afterwards died.

The Union Beneficial Society was an unincorporated association for the mutual aid of its members in case of sickness, and for their

burial in case of death. This land was used by the society for a burial ground for nearly 40 years, and then, by order of the board of health, ceased to be so used, and all the bodies which had been buried there were exhumed and removed to other cemeteries. Grimshaw afterwards procured conveyances of the land to himself from the heirs of the trustees named in Forrest's deed, as well as from Forrest's widow and from Mrs. Brooks, one of his heirs, and from Wells, the last president of the society, and one of its three surviving members. And the society (which, by the terms of its articles of association, was to continue so long as it had six members) does not appear to have since done any acts, held any meetings, or kept any records and was practically dissolved and extinct.

The present bill was filed by the other heirs of Forrest against Grimshaw and Mrs. Brooks, praying for a decree that the land had reverted to Forrest's heirs, and for a partition of the land between the plaintiffs and Grimshaw, as grantee of Mrs. Brooks, and for cancellation of the deeds from the heirs of the trustees to Grimshaw, as being a cloud upon the plaintiffs' title, and for general relief. * * *

We are then brought to the principal question in the case, which is of the nature and effect of the deed from Forrest to trustees for the Union Beneficial Society for a burial ground.

The first inquiry which naturally arises is whether the deed was for a charitable use, in the legal sense. If it was, the conveyance would not be open to any legal objection by reason of the length of time during which the trust might last, or because of the society named not being a corporation. *Ould v. Washington Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163, 171, 2 Sup. Ct. 327. And the trustees, although the deed did not in terms run to their heirs and assigns, would take the legal estate in fee. *Russell v. Allen*, above cited; *Potter v. Couch*, 141 U. S. 296, 309, 11 Sup. Ct. 1005; *Easterbrooks v. Tillinghast*, 5 Gray, 17, 21.

A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society, or of a public burial ground, or a burial ground of all persons of a certain race, class, or neighborhood, might be considered as in the nature of a dedication for a pious and charitable use. *Beatty v. Kurtz*, 2 Pet. 566, 583, 584; *Cincinnati v. White*, 6 Pet. 431, 436; *Jones v. Habersham*, 3 Woods, 443, 470, Fed. Cas. No. 7,465, and 107 U. S. 174, 183, 184, 2 Sup. Ct. 336; *Dexter v. Gardner*, 7 Allen, 243, 247; *In re Vaughan*, 33 Ch. Div. 187.

By the act of congress of May 5, 1870, c. 80, par. 5, re-enacted in the Revised Statutes of the District of Columbia, provision has been made for the voluntary incorporation of cemetery associations in the District of Columbia; and "any person or persons desiring to dedicate any lot of land, not exceeding five acres, as a burial ground or place for the interment for the dead, for the use of any society, association or neighborhood," may convey such land by deed to the District of Columbia, "specifying in such deed the society, association, or neighborhood for the use of which the dedication is desired to be made, and thereby vest the title to such land in perpetuity for the uses stated in the deed." 16 Stat. 106, 107; Rev. St. D. C. 594-604.

But the conveyance now in question, made to private persons, as trustees, 25 years before the passage of that act, was expressed to be "for the sole use and benefit of the Union Beneficial Society of the City of Washington as aforesaid, for a burial ground, and for no other purpose whatever." The articles of association of that society appear to have contemplated the burial of none but its own members; and the usage, which early sprang up, of permitting the interment in its burial ground of other inhabitants of the District of Columbia, upon the payment of certain fees, appears to have been adopted, not from any charitable motive, but as a source of private profit to the members of the association. It may be doubted whether, in the absence of express statute, the burial ground of such a society can be held to be a public charitable use. See *King v. Parker*, 9 Cush. 71; *Donnelly v. Boston Catholic Cemetery*, 146 Mass. 163, 15 N. E. 505; *Anon.*, 3 Atk. 277; *Pease v. Pattinson*, 32 Ch. Div. 154; *Cunnack v. Edwards* (1896) 2 Ch. 679; *In re Buck* (1896) 2 Ch. 727.

If it be assumed, however, as most favorable to the defendant, that this deed created a charitable trust, it was not a grant indicating a general charitable purpose, and pointing out the mode of carrying that purpose into effect; thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose. *Late Corporation of the Church of Jesus Christ v. U. S.*, 136 U. S. 1, 51-60, 10 Sup. Ct. 792; *Jackson v. Phillips*, 14 Allen, 539. But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground; adding (as if to put the matter beyond doubt), "and for no other purpose whatever". The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground, and the society was dissolved. *Easterbrooks v.*

Tillinghast, above cited; Reed v. Stouffer, 56 Md. 236, 254; Society v. Dugan, 65 Md. 460, 5 Atl. 415; In re Rymer (1895) 1 Ch. 19, 31, 32.

In Easterbrooks v. Tillinghast, above cited, an inhabitant of a town devised land to a trustee named, and his successors to be appointed as provided in the will, in trust to apply the income in support of the gospel and the maintenance of a pastor or elder in a church already existing in the town, of a certain faith and practice, so long as the members of that church, "or their successors, shall maintain the visibility of a church in said faith and order, and uniting in fellowship and communion with those who hold and practice said principles and no others". Three years after the testator's death the members of the church, reduced to two in number, voted and resolved, at a meeting called by public notice, that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct. The Supreme Judicial Court of Massachusetts, speaking by Mr. Justice Metcalf, decided that the trustee took an estate in fee, but that, the church having been dissolved, and having ceased to be a visible church, he held the land for the devisor's heirs at law, as a resulting trust. 5 Gray, 21.

In Rawson v. Uxbridge, 7 Allen, 125, cited by the defendant, the deed was to a town of land already, as the deed recited, "being improved for a burying place," *habendum* "to the said town of Uxbridge forever, to their only proper use, benefit, and behoof, for a burying place forever". There were no such negative words as in the deed now before us, "and for no other purpose whatever." The action was at law, and the only question argued or considered was whether the deed created an estate upon condition subsequent. While deciding that it did not, Chief Justice Bigelow said, "If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose, or to accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee." 7 Allen, 130.

The somewhat similar cases of Crane v. Hyde Park, 135 Mass. 147, and Mahoning Co. v. Young, 16 U. S. App. 253, 8 C. C. A. 27, and 59 Fed. 96, also cited by the defendant, likewise turned upon a question of forfeiture for breach of a condition subsequent in a deed to a municipal corporation.

In the case at bar, the trust created by the deed having been termi-

nated, according to its express provisions, by the land ceasing to be used as a burial ground, and the dissolution and extinction of the society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift, or for valuable consideration. 2 Fonbl. Eq. 116, 133, and notes; 2 Story, Eq. Jur. 1199, 1200; Hill, Trustees, 113, 133; Easterbrooks v. Tillinghast and Reed v. Stouffer, above cited.

The question suggests itself whether the case at bar falls within the rule of law known as the "rule against perpetuities," by which an estate, legal or equitable, granted or devised by one person to another, which, by the terms of the instrument creating it, is not to vest until the happening of a contingency which may by possibility not occur within the period of a life or lives in being (treating a child in its mother's womb as in being) and 21 years afterwards, is void for remoteness, and consequently a limitation over to a third person, which may possibly not take effect within the period is void, and the estate remains in the first taker. That rule does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation, or to a contingent limitation over from one charity to another. But it does apply to a grant or devise to a charity after one to a private person, as well as to a grant or devise to a private person, although limited over after an immediate gift to a charity. Russell v. Allen, 107 U. S. 163, 171, 2 Sup. Ct. 327; Jones v. Habersham, 107 U. S. 174, 185, 2 Sup. Ct. 336; McArthur v. Scott, 113 U. S. 340, 381, 382, 5 Sup. Ct. 652; Brattle Square Church v. Grant, 3 Gray, 142; Theological Education Society v. Attorney General, 135 Mass. 285; In re Tyler (1891) 3 Ch. 252; In re Bowen (1893) 2 Ch. 491.

But when there is no limitation over in the grant or devise, and the grantor or devisor, or the heirs of either, claim the estate, not under the grant or devise, but because, by reason of the failure thereof, the estate, legal or equitable, as the case may be, reverts or results to him or them, the rule against perpetuities is inapplicable.

Even when the first gift is strictly upon condition subsequent, requiring an entry on the part of the grantor or devisor, or his heirs, to revest the estate in him or them, the American courts have treated their title as unaffected by the rule against perpetuities. Cowell v. Springs Co., 100 U. S. 55; Gray v. Blanchard, 8 Pick. 283; Austin v. Cambridgeport Parish, 21 Pick. 215; Guild v. Richards, 16 Gray,

309; *Tobey v. Moore*, 130 Mass. 448; *Gray*, *Perp.* 304, 310.

But the deed in this case is clearly, in terms and effect a conveyance in trust, with no words apt to create a condition. *Stanley v. Colt*, 5 Wall. 119; *Barker v. Barrows*, 138 Mass. 578; *Attorney-General v. Wax Chandlers' Co.*, L. R. 6 H. L. 1. In such a case, it has been held, both in this country and in England, that upon the failure of the trust declared in the deed, although depending upon a contingency which might not happen within the period prescribed by the rule against perpetuities, the resulting trust to the grantor and his heirs is not invalidated by the rule. *Easterbrooks v. Tillinghast*, above cited; *Stone v. Framingham*, 109 Mass. 303; *Society v. Boland*, 155 Mass. 171, 29 N. E. 524; *In re Randell*, 38 Ch. Div. 213, 218, 219; *In re Bowen* (1893) 2 Ch. 491, 494. In *Randell's* case, Mr. Justice North said: "In my opinion, a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction cannot be said to be an invalid gift, or contrary to the policy of the law." And in *Bowen's Case* Mr. Justice Sterling said: "As property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes."

In the case at bar, our conclusions as to the effect of *Forrest's* deed, assuming it to be in the nature of a valid dedication for a pious and charitable use, may be summed up as follows: The trustees named in the deed took the legal estate in fee. The equitable estate in fee was from the beginning, and always remained, in the grantor and his heirs. The trust declared in the deed, for a burial ground for the Union Beneficial Society, came to an end, according to its own express restriction and limitation, by the land ceasing to be used as a burial ground, and the dissolution of the society. Thereupon the trustees held the legal estate in fee, subject to a resulting trust to the grantor's heirs, unaffected by the rule against perpetuities; and the legal estate of the trustees descended to their heirs, and passed by the deeds of the latter to the defendant, charged with this resulting trust. * * *

YOUNG v. BRADLEY.

101 U. S. 782; 25 L. Ed. 1044. (1879)

MR. JUSTICE MILLER delivered the opinion of the court.

The decision of this case turns upon the construction of the powers conferred by the will on the trustees named in it.

As this question of power is the principal one in the case, a critical examination of the terms of the will as connected with the condition of the trust estate and of the *cestuis que trust*, at the time of the execution of the deed, becomes necessary.

The will begins by a declaration that the testator gives, devises, and bequeaths all of his estate, real, personal, and mixed, of whatever kind it may be, and wherever situated, to William A. Bradley, Jr., his son, and A. Thomas Bradley, his cousin, and to the survivor and his heirs in trust. Then follows the distinct declaration of these trusts, the first of which is of the house in which he lived, and its furniture, and one-third of the net income of his estate besides; to his wife during her life. He next directs that the trustees shall divide all of his estate immediately after his death into four equal parts, and allot them as follows: One part to his son William, who shall receive his portion at once; one to the children then living or thereafter born to said William; one to Mrs. Linton, a married daughter; and one to Mrs. Edelin, another married daughter. The portions left to the two daughters were to include the homestead, for which each of them was to be charged \$5,000 in dividing the property; "and the trustees or the survivor of my said trustees shall also take into possession the said household effects and other chattels, and make, according to his or their best judgments, an equal distribution of the same in kind as to the whole or in part as to some, and in proceeds of sales as to others, among the parties entitled to real estate under this will, and in the same proportions."

He next directed the trustees to hold the portions of his daughters in trust for their sole and separate use, free from the control of their husbands and from liability for their debts; and he provided for such disposition of their respective shares on their death that all the interest of both of them, and in fact all the beneficial interest under the will, had vested in the children of William A. Bradley, Jr., at the time the deed to Young was made by A. Thomas Bradley. This resulted from the death of each daughter childless, and the death of testator's wife and son.

By the unanimous request of the persons interested under the will, no division into four parts and no distribution of the estate was ever made. As we have already said, by reason of the death of all the beneficiaries under the will except the children of W. A. Bradley, Jr., and by the payment of all the debts of the testator the entire interest in the estate of the testator had become vested in them; and, under these circumstances, the inquiry is, what authority had the surviving trustee to sell real estate.

The legal title it is argued, is vested in him by the will. The power conferred by item second is as ample as language can make it with the single limitation that it is subject to the trusts of the will. The estate vested in the trustees was designed to enable them to execute these trusts. It was not an estate to last forever. The things to be done by the trustees were defined, and in the nature of things were to have an end.

What were the purposes for which this trust was created, and what remained for a trustee to do in execution of them?

1. They were to hold for the benefit of the widow, during her life, and see that she received the one-third of the annual income of his estate. She is long since dead, and that trust has ceased.

2. We may suppose that in making the partition and distribution, sales to equalize, and conveyance to the distributees were necessary. The whole interest has become vested in one of the four distributees of the will, and nothing remains to be done under the trust in regard to that distribution.

3. The trustees were to hold the shares of the daughters as a protection against their husbands and for the children of these daughters until the youngest of such children should attain the age of twenty-one years, unless in the discretion of the trustees it should appear best to terminate the trust earlier. There were no such children of the daughters, and the daughters are both dead.

There was no such control over the distributive shares of the children of W. A. Bradley, Jr., and as the whole of it has come to them, the trustees are not their trustees as they were of the widow of the testator, his daughters, and their children if there had been such.

These are all the trusts declared by the will. They were all performed, superseded, or terminated before the deed to Young was made. The trustee in making that deed was discharging no trust reposed in him and no duty required of him by the will. It is not suggested anywhere that any such purpose was in view. It is said

that the property was dilapidated and needed repair. But as it belonged to Mrs. Bradley and her children and as the will did not confer on the trustees any guardianship or control over the property of the testator's son's children after their share was allotted to them, the trustees had no power over it when it came to them by the other provisions of the will on the death of the other devisees.

The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest.

Mr. Perry, in his work on Trusts, supports by a very full array of authorities these two propositions in regard to the construction of instruments out of which trust estates arise: 1. "Whenever a trust is created, a legal estate sufficient for the purpose of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not." 2. "Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires." Perry, Trusts, sect. 312. Again, he says: "In the United States, the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is, that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less." Sect. 320.

The case of *Noble v. Andrews* (37 Conn. 346) bears a strong analogy to the one before us in principle, where it was held that a gift to a person in trust for a wife during her life, and to her heirs forever, subject to her husband's curtesy, conveyed to the trustee only an estate for the life of the wife, and at her death the trust ceased.

This subject is considered and the authorities fully reviewed by Mr. Justice Swayne, in *Doe, Lessee of Poor, v. Considine*, 6 Wall, 458. "It is well settled," says he, "that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title be-

comes extinct. The extent and duration of the estate are measured by the objects of its creation."

We are satisfied that, at the time A. Thomas Bradley undertook to sell to Mark Young the property in controversy, the trust estate created in him by the will of William A. Bradley, Sen., had become extinct, and that his conveyance was void because his powers as such trustee had ceased. * * *

SEC. 3. EQUITABLE CONVERSION.

CRAIG v. LESLIE.

3 *Wheat. (U. S.)* 564; 4 *L. E.* 460. (1818)

This was a case certified from the circuit for the district of Virginia, in which the opinions of the judges of that court were opposed on the following question: viz. whether the legacy given to Thomas Craig, an alien, in the will of Robert Craig, is to be considered as a devise, which he can take only for the benefit of the commonwealth, and cannot hold; or a bequest of a personal chattel, which he could take for his own benefits?

This question grows out of the will of Robert Craig, a citizen of Virginia and arose in a suit brought on the equity side of the Circuit Court for the District of Virginia, by Thomas Craig, against the trustees named in the will of the said Robert Craig, to compel the said trustee to execute the trusts, by selling the trust fund, and paying over the proceeds of the same to the complainant.

The clause in the will of Robert Craig, upon which the question arises, is expressed in the following terms: viz, "in the first place, I give, devise, and bequeath unto John Leslie," and four others, "all my estate, real and personal, of which I may die seised or possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years credit, and my real estate on one, two, and three years credit, providing satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and per-

sonal, which I have herein directed to be sold, to be remitted unto him accordingly as the payments are made, and I hereby declare the aforesaid John Leslie", and the four other persons, "to be my trustees and executors for the purposes afore-mentioned." * * *

MR. JUSTICE WASHINGTON delivered the opinion of the court.

The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the State of Virginia, that this incapacity does not extend to personal estate. The only inquiry then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself?

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine that a devise of money, the proceeds of land directed to be sold, is a devise of money notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others; see *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, 2 P. Wms. 358; *Trelawney v. Booth*, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually

performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his life time.

In the case of *Kirkman v. Mills*, 13 Ves. which was a devise of real estate to trustees upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the *cestui que trusts*, after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held, that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases.

The same doctrine is laid down and maintained in the case of *Edwards v. The Countess of Warwick*, 2 P. Wms. 171, which was a covenant on marriage to invest ten thousand pounds, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such; and that, therefore, even his parol disposition of it would have been regarded, but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of *Roper v. Radcliffe*, which was cited, and mainly relied upon, by the counsel for the State of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, upon appeal to the house of lords, reversed, and the

title of the heir at law sustained; six judges against five being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2. The case itself, as far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are; 1. That land devised to trustees, to sell for payments of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion: 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purpose directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir at law, as the old use not disposed of. Such was the case of *Crewe v. Bailey*, 3 P. Wms. 20; where the testator having two sons, A. and B. and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave two hundred pounds to A. the eldest son at the age of twenty-one, and the residue to his four younger children. A. died before the age of twenty-one, in consequence of which, the bequest to him failed to take effect. The court decided that the two hundred pounds should be considered as land to descend to the heir at law of the testator, because it was, in effect, the same as if so much land as was of the value of two hundred pounds was not directed to be sold, but was suffered to descend. The case of *Ackroyd v. Smithson*, 1

Bro. Ch. Cas. 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. *Hewitt v. Wright*, 1 Bro. Ch. Cas. 86.

But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yeates v. Compton*, 2 P. Wms. 308, in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that this was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of *Fletcher v. Ashburner*, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the cases of *Emblyn v. Freeman*, and *Crewe v. Bailey*, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of *Roper v. Radcliffe* is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust*, of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

But the court cannot accede to the conclusion, which, in *Roper v. Radcliffe*, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life time, the property will then assume the character of land. But if he does not make this election, the property retains its character of personalty to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of *Roper v. Radcliffe*.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition, it should be shown that this right or privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was indeed contended for with great ingenuity and abilities by the counsel for the State of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the *cestui que trust*. It will be refused if he be an infant. In the case of *Seeley v. Jago*, 1 P. Wms. 389, where money

was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided: on the death of A., his infant heir, together with B. and C. filed their bill claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foone v. Blount*, Cowp. 467; Lord Mansfield, who is compelled to acknowledge the authority of *Roper v. Radcliffe* in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

The case of *Walker v. Denne*, 2 Vés. Jun. 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts*, though a *feme covert*, was held sufficient indication of her intention that it should continue personal, against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: in short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where

the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of *Roper v. Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

The incapacities of a papist under the English statute of 11 and 12 W. III. c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered or done, to or for the use of such person, or upon any trust for him, or to or for the benefit or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In *Roper v. Radcliffe*, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so (and it is not material in this case to affirm or deny that position), then the will of John Roper in relation to the bequest to the two papists was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

Now, what is the situation of an alien? He can not only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received. In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity,

to have the land by escheat, as if the alien had, or could upon the principles of a court of equity have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper v. Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield, in the case of *Foone v. Blount*, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided. The case of the Attorney-General and Lord Weymouth, Ambler, 20, was also pressed upon the court, as strongly supporting that of *Roper v. Radcliffe*, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the chancellor so considers it; for, he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and incumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as *Roper v. Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, in this case the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land, was to be taken as personalty, or land; and, although he mentions the case of *Roper v. Radcliffe*, he adds, that he does not depend upon it, as it was immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole, we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

CHAPTER X.

FUTURE ESTATES.

- Section 1. Reversions.
- Section 2. Remainders.
- Section 3. Failure of Contingent Remainders.
- Section 4. Acceleration of Remainders.
- Section 5. Transfer of Contingent Remainders.
- Section 6. Rule in Shelley's Case.

SEC. 1. REVERSIONS.

POWELL v. DAYTON, ETC., R. R. CO.

16 Oregon, 33; 8 Am. St. Rep. 251; 16 Pac. 863. (1888)

LORD, C. J.

* * * A reversion is defined by Blackstone to be: "The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him": 2 Bla. Com. 175. Coke describes it as follows: "The returning of land to the grantor, or his heirs, after the grant is over." It seems, then, to have two significations: the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended: Abbott's Law Dictionary. The reason which Mr. Comyn gives why the lessee is bound to treat the premises demised in such a manner that no injury may be done to the inheritance is, "that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee:" Comyn on Landlord and Tenant, 188. Where no other contract exists between the parties but a lease, whether the estate shall revert after the termination of the particular estate, or the residue left in the landlord shall commence in possession after the particular estate is ended, is certain and irrevocably fixed from the nature of the contract; and hence, for any wrongful act done which

then causes an injury to the reversion, a right of action immediately accrues. * * *

CONWELL v. STATE.

3 Ind. 387; 56 Am. Dec. 512. (1852)

SMITH, J. This was an indictment for riot. The indictment charges that, on, etc., at, etc., Conwell and five others did unlawfully, riotously, etc. assemble together to disturb the peace, and did make a great noise, riot, etc., and did riotously, etc., strike, beat, etc., one Smith, in the peace of the state, etc. The defendants pleaded not guilty. Conwell and two of the other defendants were found guilty and fined, and three of the defendants were acquitted.

The record does not contain the evidence, but a bill of exceptions states that the defendants requested the court to charge the jury that "if Conwell owned a part of the reversion or remainder of the land in dispute, and there was a suit pending between himself and Hedrick, involving a question of waste or improvements, Conwell was authorized to go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same," and that "there was evidence in the case authorizing said charge;" but the court refused to give it.

Not having the evidence before us, we cannot estimate what effect this instruction would have had upon the result of the trial, but we can see no objection to it as an abstract principle of law, and, from all that appears, we think it should have been given.

SEC. 2. REMAINDERS.

DOE LESSEE OF POOR v. CONSIDINE.

6 Wall. 458, 18 L. Ed. 869. (1867)

The lessors of the plaintiff in error brought an action of ejectment to recover certain real estate now here in controversy. The parties agreed upon the facts. William Barr, Senior, died on the 15th of May, 1816, leaving a will duly admitted to probate in Hamilton County, Ohio. It was out of the will that the controversy arose.

The testator left three daughters: Mary, the wife of William Barr; Susan the wife of John B. Enness; and Mary B., the wife of James Keys. He left also one son, John M. Barr, who at the time of his father's death, had living, a wife, Maria Barr, and an infant daughter, Mary Jane Barr.

John M. Barr, the son of the testator, died on the 10th of August, 1820.

Mary Jane Barr, the daughter of John M. Barr, died on the 27th of November, 1821. Maria Barr, her mother, died on the 3d of August, 1860. * * *

The will contained among others the following provisions:

"I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular, that certain farm, tract or parcel of land, situate, lying and being in the county of Hamilton, State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survives him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said

Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever. * * *

MR. JUSTICE SWAYNE delivered the opinion of the court.

I. At the threshold of the subject before us, the inquiry arises as to the extent of the trust estate vested by the will in the three sons-in-law of the testator.

The determination of this point is not vital in the case; for whether they took the legal fee or not, and whether the estate of Mary Jane Barr was legal or equitable in its character, the result must be the same. The same rules of law apply to descents and devises of both classes of estates; and if in this case an equitable fee in remainder was vested in Mary Jane Barr at the time of her death, while the legal fee as a dry trust was held by the sons-in-law, those holding the latter title could not recover in this action against parties clothed with the equitable estate, and entitled to the entire beneficial use of the property. But we entertain no doubt upon the subject.

The devise contains words of inheritance. It is to the trustees "and to their heirs". This language, if unqualified by anything else in the clause, would pass the fee. But when we look to the purposes of the trust, and the power and duties of the trustees, we find them limited to two objects:

1. The trustees were to permit John M. Barr to enjoy the premises and receive the rents, issues and profits during his life.

2. If John M. Barr should die, leaving issue, and his wife Maria should survive him, then they were to permit her, during her life, to enjoy the possession and profits of the property.

A drier trust could not have been created. The duties of the trustees were wholly passive. They were authorized to do no act. They were simply to hold the estate committed to them until one or both

the events defining the boundary of its existence had occurred. It was to subsist in any event during the life of John M. Barr, and if he died, leaving issue, and his wife survived him, it was to subsist also during her life. The executors were directed, in any event, to make an expenditure upon the property, and to take the fund from the personal estate. This duty had no connection with the trust, and its bearing upon the case is in nowise affected by the fact that the executors and trustees happened to be the same persons. Whether John M. Barr died with or without issue, the entire object of the trust was fulfilled, and its functions were exhausted when the persons for whose benefit it was created ceased to live. "The remainder of the estate in said farm," in the language of the testator, thereupon passed according to the provisions of the will. It is neither expressed nor implied that the trust estate should exist any longer, and no imaginable purpose could be subserved by its longer continuance. When a trust has been created it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says: 2 Jar. Wills 156.

"Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what, less estate."

Chancellor Kent says: 4 Kent, Com. 233.

"The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding the devise to the trustees and their heirs, they take only a chattel interest where the trust does not require an estate of higher quality."

This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses. The

consequences in this case of the absence of such a statute in Ohio, it is therefore not necessary to consider.

We are of opinion that the trust estate of the sons-in-law of the testator was only an estate *par autre vie*, and that it terminated at the death of Maria Barr.

II. This brings us to the consideration of the question what was the estate, in quantity and quality, of Mary Jane Barr at the time of her decease?

The hinge upon which turns this part of the controversy is the following language of the will:

"And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever."

The plaintiff in error claims that this clause is an executory devise, and that it gave to Mary Jane Barr, a contingent estate, to take effect upon the event of her outliving both her parents, and not otherwise; and that as she died before her mother no title or interest ever vested in her.

The defendants claim that upon the death of the testator, Mary Jane Barr took under the will a vested remainder, subject to open and let in after-born children, if any there were, and deferred as to the period of enjoyment until the death of the one parent who should survive the other, but liable to no other contingency, and limited by no other qualification.

This point of the will must be examined by its own light, and also in the light of the adjudications in like cases.

Considering it without the aid of authority, we have no difficulty in coming to a conclusion as to its proper construction.

We think that it gives:

1. A legal estate *par autre vie*, to three sons-in-law in trust.

2. An equitable life estate, with the usufruct of the property to John M. Barr.

3. In case he should die, leaving issue, and his wife Maria should survive him, then an equitable estate for life to her with the usufruct of the property, for the benefit of herself and the surviving child or children of John M. Barr.

4. A vested remainder in fee simple to the child of John M. Barr, living at the time of the death of the testator, subject to open and let in the participation of after-born children, and liable to be divested by their dying before their father, but not liable to be defeated by any other event.

5. The devise over to the three sons-in-law was an alternate or collateral contingent remainder; and if John M. Barr had died leaving no children surviving him, that remainder would thereupon at once have vested and been converted into an absolute fee simple estate.

In no event, except the death of John M. Barr, without issue, did the will give them any interest in the property other than the temporary trust estate.

By the vesting of the remainder in Mary Jane Barr, at the death of the testator and the death of her father, this provision in behalf of the sons-in-law became as if it were not. It was utterly annulled, and could not thereafter take effect either as a contingent remainder or as an executory devise. We are satisfied the testator did not extend his vision or seek to control this property beyond the period of the death of his son, John M. Barr. With a view to that event he made two provisions equally absolute, emphatic, and final in their terms. In that respect there is no difference. The result, whether the one or the other should take effect, was to depend upon the single fact whether John M. Barr died with or without surviving children.

The language used carried the entire estate of the testator in the premises alike in both cases, and we can no more hold the word "heirs" to be the synonym of "issue", or otherwise qualify the estate intended to be given in the one case than in the other.

The theory of the counsel for the plaintiff derives no support from the principle of human nature, which not unfrequently impels a testator to transmit his property, as far as possible, in the line of his descendants. Here Barr, Keys' and Enness were not of the blood of the testator. He could not but be aware that if they took the property it might pass from them, by descent or purchase, to those

who were strangers to his blood, and in nowise connected with his family.

Having disposed of the property absolutely at the death of his son, he left the future, beyond that boundary, with its undeveloped phases, whatever they might be, to take care of itself.

III. We will now examine the case in the light of principle and authority.

A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed *in futuro*. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, or *eo instanti* that it determines.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event.

A contingent remainder, if it amount to a freehold, cannot be limited on an estate for years, nor any estate less than freehold. A contingent remainder may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence, trustees are appointed to preserve such remainders.

An executory devise is such a disposition of real property by will that no estate vests thereby at the death of the deviser, but only on a future contingency. It differs from a remainder in three material points:

1. It needs no particular estate to support it.
2. A fee simple or other less estate may be limited by it—after a fee simple.
3. A remainder may be limited, of a chattel interest, after a particular estate for life in the same property.

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.

Adverbs of time—as when, thereafter, from, etc.—in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest.

Where there is a devise to a class of persons to take effect in en-

joyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward.

An estate once vested will not be divested unless the intent to divest clearly appears.

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.

"When a remainder is limited to a person *in esse* and ascertained, to take effect by express limitation, on the termination of the preceding particular estate, the remainder is unquestionably vested."

This rule is thus stated with more fulness by the Supreme Court of Massachusetts. "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained be immediately converted into a vested remainder. *Blanchard v. Blanchard*, 1 Allen 227.

In 4th Kent's Commentaries, 282, it is said: "This has now become the settled technical construction of the language and the established English rule of construction." It is added: "It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."

It is further said in the same volume: (284) "A. devises to B. for life, remainder to his children, but if he dies without leaving children, remainder over, both the remainders are contingent, but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder

in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."

We have quoted this language because of its appositeness to the case under consideration. The propositions stated are fully sustained by the authorities referred to. Other authorities, too numerous to be named, to the same effect, might be cited. We content ourselves with referring to a part of those to which our attention has been called in the briefs in this case. (Citing many cases.)

This doctrine received the sanction of the Supreme Court of Ohio in *Jeefers v. Lampson*, 10 Ohio St. Rep. 101, where it was adopted and applied. The leading authorities relied upon by the counsel for defendants in error in this case were cited by the court and control the result. We are bound by this decision as a local rule of property.

The same doctrine has been sanctioned by this court.

According to the theory of the plaintiff's counsel, if Mary Jane Barr had married and had died before her mother, leaving children, they would have been cut off from the estate. Surely the testator could not have intended such a result.

In three of the cases, substantially like this as to the point under consideration, brought to our attention by the counsel for the defendants in error, this consequence of such a construction was adverted to by the court.

In *Carver v. Jackson*, 4 Pet. 1, the court say: "It is also the manifest intention of the settlement, that if there is any issue, or the issue of any issue, such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this court."

In *Goodtitle v. Whitby*, 1 Burrow, 233, Lord Mansfield said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty marries and dies before his age of twenty-one, leaving children, could the testator intend in such an event to disinherit them? Certainly he could not."

In *Doe v. Perryn*, 3 Term. 495, Buller, Justice, said: "But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born who died in the lifetime of his parents, leaving issue, such

grandchild could not take; which could not be supposed to be the intention of the devisor."

Mary Jane Barr was, at the death of the testator, within every particular of the category, which according to the authorities referred to, creates a vested remainder.

1. The person to take was *in esse*.
2. She was ascertained and certain.
3. The estate was limited, to take effect in her absolutely, upon the death of her father.
4. That was an event which must unavoidably happen by the efflux of time.
5. Nothing but her death, before the death of her father, would defeat the remainder limited to her.
6. She had a fixed right of property on the death of the devisor. The period of enjoyment only was deferred and uncertain.
7. The time of enjoyment in possession depended upon the death of her mother. The right was in nowise dependent on that event.
8. Upon the death of her father, she surviving him, her estate, before defeasible, became indefeasible and absolute.

We are thus brought to the conclusion, upon technical as well as untechnical grounds, that Mary Jane Barr had, at the time of her death, an indefeasible estate of remainder in fee in the premises in controversy.

In the view we have taken of this case, the doctrine of shifting uses can have no application; we therefore forbear to advert to the rules of law relating to that subject.

IV. Mary Jane Barr having died unmarried and intestate, it remains to inquire to whom her estate passed.

The descent cast was governed by the statute of December 30th, 1815.

The first section only applies to the subject.

The first part of the fourth clause of that section is as follows:

"4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the brothers and sisters of the ancestor from whom the estate came, or their legal representatives." This gave the property "to the brothers and sisters" of the testator, "or their legal representatives."

The language of this clause is plain and unambiguous. There is

nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction. We concur entirely in the views of the eminent counsel, whose professional opinions, long since written, have been submitted to us. We think the point hardly admits of discussion. If there could be any doubt on the subject, it is removed by the act of 1835, which substitutes for the rule of descent here under consideration, the one which we are asked to apply. Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating we should legislate. That we have no power to do. Our function is to execute the law, not to make it.

The instructions given by the court to the jury were in accordance with the views we have expressed. We find no error in the record, and the judgment is

Affirmed.

DOE d. PLANNER v. SCUDAMORE.

2 Bos. & P 289. (1800)

This was an ejectment to recover possession of a messuage and lands described in the declaration which came on to be tried at the last assizes for Bedfordshire, when a verdict was found for the plaintiffs, subject to the opinion of the court, on a case in substance as follows:

Thomas Lane on the 9th of March, 1792, by his will duly executed, devised as follows: "I give and devise my messuage or tenement and farm called Buckingham-hall with the lands and appurtenances thereunto belonging and all other my real estate whatsoever situate lying and being in the parishes of Higham Gobias Pulloxhill and Barton or elsewhere in the county of Bedford unto and to the use of my brother George Lane of the city of Canterbury and his assigns for and during the term of his natural life without impeachment of waste, and from and immediately after his death then I give and devise the same unto and to the use of my amiable friend Catherine Benger (niece to Mrs. Mary Shindler of Burgate Street Canterbury and who at this time lives with me and superintends the management of my family) her heirs and assigns forever in case she the

said Catherine Benger shall survive and outlive my said brother but not otherwise; and in case the said Catherine Benger shall die in the life-time of my said brother then and in such case I give and devise my said messuage farm lands and real estate in the said county of Bedford unto and to the use of my brother George Lane his heirs and assigns forever." In March, 1793, the said Thomas Lane died without having altered or revoked his said will, leaving the said George Lane, his brother, and heir at law, him surviving, who thereupon entered on the estate so devised, being the premises in question. In Trinity term, 1793, the same George Lane levied a fine *sur conuzance de droit come ceo*, &c., with proclamations of the premises in question, and declared the use of the said fine to himself in fee. On the 15th December, 1796, the said George Lane, by his will duly executed, devised the said premises to Edward Scudamore the defendant in fee; and in November, 1799, the said George Lane died in possession of the premises, without having altered or revoked his said will. On the 29th of May, 1798, the said Catherine Benger made an actual entry upon the premises in question, being within five years after levying the said fine, and for the purpose of avoiding the same. Catherine Benger afterwards married John Planner, and on the 17th of January, 1800, before the bringing of this ejectment, the said John and Catherine Planner, the lessors of the plaintiff, made an actual entry on the said premises.

The question for the opinion of the court was, Whether the lessors of the plaintiff were entitled to recover? If they were, the verdict was to stand, but if not, a verdict to be entered for the defendant.

* * *

LORD ELDON, Ch. J. There can be no doubt that if this be a contingent remainder it will have been destroyed by the operation of the fine, but if it be a vested remainder or an executory devise, no such effect will have taken place. In my opinion the devise of the fee to C. Benger is contingent, and the devise of the fee to G. Lane is contingent also. * * * The result of the cases is this; the testator gives an estate for life to his brother and if C. Benger survives his brother he gives her an estate in fee; but on the contrary, if C. Benger does not survive his brother he gives his brother an estate in fee. The brother being tenant for life, destroys his life estate, before the contingency of survivorship has taken place; consequently the remainders depending thereon are destroyed, and the brother comes in as heir at law.

HEATH, J. Two questions have been made in this case: first,

Whether the condition be precedent or subsequent? Secondly, Whether the devise to C. Benger be a contingent remainder or executory devise? It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction according to the intent of the devisor. The question always is, Whether the thing is to happen before or after the estate is to vest? If before, the condition is precedent; if after, it is subsequent. In this case it is clear that the event is to happen before the estate can vest: for the brother is to die before C. Benger can be entitled to the estate, the words being "in case the said C. Benger shall survive and outlive my said brother, and not otherwise." In all the cases which have been cited to prove this a condition subsequent, the intent of the testator has been clear that the estate should vest immediately in possession. Such was the case before Lord Talbot, and such was the case of *Edwards v. Hammond*. This case therefore is distinguishable from the cases cited, since in those cases the estate was not intended to vest in possession immediately. As to the second question, it has been decided so long ago that it will not admit of discussion. The case is not distinguishable from *Plunket v. Holmes*. Where a freehold is limited to the first taker and afterwards a fee is given on a condition, if it may take effect as a contingent remainder it shall do so; and it is not material that a fee might have descended to the first taker independent of the will.

ROOKE, J. I am of opinion that this is a contingent remainder, and I found that opinion on the case of *Plunket v. Holmes*. It was the intent of the testator that G. Lane should take for life, and that after his decease, C. Benger should take an estate in fee if she survived him, but if she did not survive him that G. Lane, who was the heir at law, should take an estate in fee. Here therefore there was a particular estate for life, which was sufficient to support the devise over as a contingent remainder; and it is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise.

CHAMBRE, J. I am of the same opinion. The case is perfectly clear both on reason and authorities.

Judgment for the defendant.

McARTHUR v. SCOTT.

113 U. S. 340; 5 Sup. Ct. 652; 28 L. Ed. 1015. (1885)

GRAY, J. This case presents three principal questions. First, Whether the equitable estate in fee, which Duncan McArthur, by his will, undertook to devise to his grandchildren, children of his five surviving children, was vested or contingent. Second. Whether the devise of that estate, so far as it is to the present plaintiffs, was void for remoteness. Third. Whether the decree in 1839, setting aside his will, and annulling the probate, is a bar to this suit.

1. The principal provisions of the will of Duncan McArthur, material to the decision of this case, are as follows:

By the fifteenth clause, he directs that his lands in the counties of Ross and Pickaway shall be leased or rented by his executors "until the youngest or last grandchild which I now have, or may hereafter have," the child of either of his five surviving children, Allen C., James McD., Effie, Eliza Ann, or Mary, "who may live to be twenty-one years of age, shall arrive at that age." By the sixteenth clause, he directs that, until that time, the income of these lands, and the dividends of all stocks held by him, or purchased by his executors, shall be by them annually divided equally among the five children aforesaid, or the issue of any child dying, and among the grandchildren also as they successively come of age.

The seventeenth clause provides as follows: "It is my further will and direction that after the decease of all my children now living, and when and as soon as the youngest or last grandchild, in the next preceding clause but one of this will designated and described, shall arrive at the age of twenty-one years all my lands" in question "shall be inherited and equally divided between my grandchildren per capita, the lawful issue of my said sons and daughters, Allen C., James McD., Effie, Eliza Ann, and Mary, for them and their heirs forever, to have and to hold, or to sell and dispose of the same at their will and pleasure; and in like manner all the stocks belonging to my said estate, whether invested before or after my death, shall at the same time be equally divided among my said grandchildren, share and share alike, per capita; but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive per stirpes (to be equally

divided between them) the share of my said estate both real and personal, which the parent of such deceased child or children would have been entitled to have and receive if living at the time of such final distribution." The word "deceased", near the end of this passage, was evidently intended to be prefixed to the word "parent", instead of to the words "child or children", so as to read "deceased parent of such child or children." By the eighteenth clause, he directs that "in such final distribution of my lands" the executors for the time being shall make deeds of partition "to and in the names of those who may be thus entitled thereto," and, "to enable my executors the more effectually to execute the powers and duties by this will devolved upon them, and to protect my said children and grandchildren against fraud and imposition," he devises the lands to his executors and their successors, "and to their heirs, in trust for the uses and purposes and objects expressed in this my will, and the performance of which is herein above directed and prescribed, to have and to hold the title thereof till such final division or partition thereof, and no longer." By the twenty-fourth clause, he appoints three executors, and directs and requests that if either of them shall die, resign, or refuse to act, the court having probate jurisdiction for the county of Ross shall appoint a new one instead to act as an executor with the others, so that there shall always be three executors.

The devise in the eighteenth clause of the title in the lands to the executors and their successors, and their heirs, in trust for the uses and purposes expressed in the will, to have and to hold until the final division or partition, clearly gave them an estate in fee, to last until that time. *Doe v. Edlin*, 4 Adol. & E. 582; *Maden v. Taylor*, 45 Law J. (N. S.) c. 569. And there can be no doubt that, as contended by the learned counsel for the defendants, the powers conferred and the trusts imposed upon the executors were annexed to their office of executors, and did not make them trustees in another and different capacity. *Colt v. Colt*, 111 U. S. 566, 581; S. C. 4 Sup. Ct. Rep. 553; *Treadwell v. Cordis*, 5 Gray, 341, 358; *Gandolfo v. Walker*, 15 Ohio St. 251.

The equitable estate created by the gift in the sixteenth clause of the income to the children and grandchildren, being an estate which must endure for the lives of the children, and might endure throughout the lives of the grandchildren, though subject to be sooner determined in the contingency of the coming of age of the youngest grandchild, was technically an estate for life. 2 Bl. Comm. 121. The

nature of the equitable estate in remainder created by the seventeenth clause demands more consideration. The counsel for some of the defendants contended that it was contingent upon the arrival of the youngest grandchild at 21 years of age. In that view, the whole estate in remainder, being dependent upon the termination of the particular estate for life, and vesting at that time and not before, would be in legal effect an equitable contingent remainder to the grandchildren then living, and the issue then living of grandchildren theretofore deceased, as one class.

In behalf of other defendants it was contended that the remainder in fee expectant upon the estate for life vested immediately in the grandchildren living at the death of the testator, opened to let in after-born grandchildren, and vested in them successively at birth, and would be divested as to the shares of those grandchildren only who should die, leaving children, before the determination of the life-estate, by force of the direction that such children should take those shares. In this view, all the grandchildren took a vested remainder in fee; and the gift over to the children of any deceased grandchild, inasmuch as it did not depend upon any precedent particular estate, but was by way of substitution for the devise in fee to that grandchild, was an executory devise.

For many reasons, not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience require that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.

In the will before us the testator directs the income to be divided annually, in specified and changing proportions, among his five children living at his death, and their children, until the youngest grandchild comes of age. He gives no part of the income to children of grandchildren. He gives the fee, when the youngest grandchild comes of age, to the grandchildren and the children of deceased grandchildren. His general intent clearly is to give the income of the estate to the children and grandchildren so long as any grandchild is under age, and the principal to the issue of the five children, whether such issue are his grandchildren or his great grandchildren.

If all the children and grandchildren should die before any grandchild should come of age, the distribution of the income would necessarily cease. In that event, if any of the grandchildren dying under age should leave children, the effect of holding the remainder to be contingent upon the coming of age of the youngest grandchild would, as that contingency had never happened, cut off the great grandchildren from any share in the estate, in direct contravention of the general intent of the testator. The more reasonable inference is that, upon the determination of the life-estate by the death of all the children and grandchildren, for whose benefit it was created, the great grandchildren would be immediately entitled to the remainder. *Castle v. Eate*, 7 Beav. 296; *Manfield v. Dugard*, Gilb. Eq. 36; S. C. 1 Eq. Cas. Abr. 195, pl. 4. Upon that construction, the contingency contemplated must necessarily happen at some time, either by the arrival of the youngest grandchild at 21 years of age, or by the death of all the grandchildren under age; and the case would come within the settled rule that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the afflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained: provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession." *Doe v. Considine*, 6 Wall. 458, 476; *Moore v. Lyons*, 25 Wend. 119, 144; *Blanchard v. Blanchard*, 1 Allen, 223, 227.

The terms in which the testator has expressed his intention likewise point to a vesting of the remainder in all his grandchildren. The only gift of real estate in remainder to grandchildren is contained in the opening words of the eighteenth clause, by which the testator directs that "after the decease of all my children now living, and when and as soon as the youngest grandchild shall arrive at the age of twenty-one years," the lands "shall be inherited and equally divided between my grandchildren per capita, the lawful issue of my said sons and daughters," in fee. This gift is not to such grandchildren only as shall be living at the expiration of the particular estate; but it is to "my grandchildren per capita, the lawful issue of my said sons and daughters," words of description appropriate to designate all such grandchildren. At the expiration of the particular estate, the lands are to be "inherited and equally divided" among the grandchildren, and "in like manner" the stocks are to be "equally

divided" among them. The real estate and the personal property are clearly to go to the same persons and at the same time.

The word "inherited", which is applied to the real estate only, implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death. Devises or bequests in remainder, by the use of similar words, though preceded, as in this case, by the word "then", have been often held to be vested from the death of the testator. *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Parker v. Converse*, 5 Gray, 336; *Dove v. Torr*, 128 Mass. 38. The case of *Thorn-dike v. Loring*, 15 Gray, 391, cited for the defendants, is clearly distinguished by the fact that there the bequest of the principal, at the expiration of fifty years, was confined to "those who would then be my lawful heirs and entitled to my estate, if I had then died intestate."

The words "and equally divided per capita," while they qualify the effect of the word "inherited" so far as to prevent a taking by the grandchildren per stirpes as under the statute of descents, also plainly indicate a vested remainder. Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. For instance, under a devise of an estate, legal or equitable, to the testator's children for life, and to be divided upon or after their death among his grandchildren in fee, the grandchildren living at the death of the testator take a vested remainder at once, subject to open and let in after-born grandchildren; although the number of grandchildren who will take, and consequently the proportional share of each, cannot of course be ascertained until the determination of the particular estate by the death of their parents. *Doe v. Considine*, 6 Wall. 458; *Cropley v. Cooper*, 19 Wall. 167; *Dingley v. Dingley*, 5 Mass. 535; *Doe v. Provost*, 4 Johns. 61; *Linton v. Laycock*, 33 Ohio St. 128; *Doe v. Perryn*, 3 Term. R. 484; *Randoll v. Doe*, 5 Dow. 202. So, a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest. *Shattuck v. Stedman*, 2 Pick. 468; *Hallifax v. Wilson*, 16 Ves. 168; *In re Bennett's Trust*, 3 Kay & J. 280; *Strother v. Dutton*, 1 De G. & J. 675.

The remainder, being vested according to the legal meaning of

the words of gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it. The subsequent provisions of this will had other objects. The direction that if any grandchild shall have died before the final division, leaving children, they shall take and receive per stirpes the share of the estate, both real and personal, which their parents would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild, and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren; and its only effect upon that gift is to divest the share of any grandchild deceased leaving issue, and to vest that share in such issue. *Smithers v. Willock*, 9 Ves. 233; *Goodier v. Johnson*, L. R. 18 Ch. Div. 441; *Darling v. Blanchard*, 109 Mass. 176; 1 Jarm. Wills (4th Ed.) 870.

The addition, in the eighteenth clause of the will, of the provisions that any assignment, mortgage, or pledge by any grandchild of his share shall be void, and that the executors, in the final partition and distribution, shall convey and pay to the persons entitled under the will, rather tends to show that the testator considered the estate to be vested, and to be in danger of being alienated but for these provisions; and, whatever their legal effect may be, they cannot be construed as making a remainder contingent, which the terms of the previous gift, and the general intent of the testator, as appearing from the whole will, require to be vested. *Hall v. Tufts*, 18 Pick. 455. For these reasons, we are of opinion that the will purports to devise to all the grandchildren per capita, children of the five surviving children of the testator, a vested remainder in fee; and to the children per stirpes of any grandchildren deceased before the arrival of the youngest grandchild at 21 years of age, a similar estate in fee by way of executory devise.

To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and 21 years afterwards. In the case at bar, as the youngest grandchild must be in being in the life-time of his parent, and that parent was born in the testator's life-time, the devise to the grandchildren, and even the devise over, upon the arrival of the youngest grandchild at 21 years of age, to the children of any grand-

child deceased before that time, must necessarily take effect, as to every devisee, within a life or lives in being and 21 years afterwards, and therefore do not violate the rule of the common law; and it is unnecessary to consider whether that rule is in force in Ohio.

The statute of Ohio of December 17, 1811, in force at the making of this will, and at the testator's death, imposed different restrictions upon grants and devises of real estate, by enacting that "no estate in fee simple, fee tail, or any lesser estate, in lands or tenements lying within this state, shall be given or granted by deed or will to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will." 2 Chase's St. 762.

It was assumed at the argument, and can hardly be doubted, that in this statute the words "the time of making such deed or will," which, as applied to a deed, designate the time both of its execution and of its taking effect, denote, as applied to a will, the time when it takes effect by the death of the testator, and not the date of its formal execution. By the law of England, the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will. *Williams v. Teale*, 6 Hare, 239; 251; *Cattlin v. Brown*, 11 Hare, 372, 382; *Lewis*, Perp. Supp. 53-60, 64; 1 Jarm. Wills, 254.

Under the common-law rule against perpetuities, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void. *Leake v. Robinson*, 2 Mer. 363; *Pearks v. Moseley*, J. R. 5 App. Cas. 714. But that is because, as observed by Sir William Grant, "it is the period of vesting and not the description of the legatees that produces the incapacity," and the devise is not "to some individuals who are, and to some who are not, capable of taking." 2 Mer. 388, 390. The rule of the common-law, by which an estate devised must at all events vest within a life or lives in being and 21 years afterwards, has reference to time and not to persons. Even the "life or lives in being" have no reference to the persons who are to take, for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the "twenty-one years afterwards" are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are 21 years in gross, without regard to the life or to the coming of age of any person soever. *Cadell v. Palmer*, 1 Clark & F. 372; S. C. 7 Blight (N. S.) 202.

It is doubtful, to say the least, whether the like effect can be attributed to the statute of Ohio, which has no reference to time, and only avoids devises to persons who are not either in being themselves, or the immediate issue or immediate descendants of persons in being at the time of the making of the will. The devise of their parent's share to the children of any grandchild deceased before the time of division would seem to be valid as to those great grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be "immediate issue" of a person in being at that time; and valid also as to any great grandchildren whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not "immediate issue," certainly "immediate descendants," of that child who was in being at that time; and invalid as to those great grandchildren only, whose parent (as in the case of Mrs. Madeira, daughter of the testator's child Mary Trimble), born since the testator's death, died after their grandparent, and who, therefore, by reason of the interposition of the life of their parent, were neither "immediate issue" nor "immediate descendants" of a person in being when the testator died. See *Stevenson v. Evans*, 10 Ohio St. 307; *Turley v. Turley*, 11 Ohio St. 173. But, however that may be, the conclusion, already announced, that the estate in remainder devised by Duncan McArthur was vested in all his grandchildren per capita, with an executory devise over of the shares of those only who should die, leaving issue, before the final division, removes all difficulty in the application of the statute to the shares devised to the plaintiffs, grandchildren of the testator; for the devise to grandchildren, immediate issue of persons in being at the making of the will, was clearly not prohibited by the statute; and, even under the English rule, the executory devise over of the shares of deceased grandchildren to their children, if void for remoteness, would not defeat the previous valid devise of a vested remainder to the grandchildren, nor alter the share which each living grandchild would take. *Cattlin v. Brown*, 11 Hare, 372; *Lord Selborne*, in *Pearks v. Moseley*, L. R. 5 App. Cas. 719, 724, 725; *Goodier v. Johnson*, L. R. 18 Ch. Div. 441.

The necessary conclusion is that these plaintiffs, being grandchildren of the testator, took equitable vested remainders under his will. But until the termination of the particular estate by the death of all the testator's children, and the arrival at the age of 21 years of the youngest grandchild who reached that age, the legal estate in fee

being in the executors, the grandchildren owning the equitable estate in remainder had no right to a conveyance of the legal title. The present bill, filed little more than a year after one of the plaintiffs, who was the youngest grandchild of the testator who lived to the age of 21 years, arrived at that age, must therefore be maintained, unless the title of the plaintiffs, under the will of their grandfather, has been defeated by the decree rendered in 1839, setting aside the will.

* * *

Note: If the devise had been to such of the testator's children as survived the life tenant, with a provision that in case a child died before the life tenant, his children should take his share, the remainder is contingent because the remaindermen are not certain. *Whitesides v. Cooper*, 115 N. C. 570; 20 S. E. 295.

RICHARDSON v. PENICKS.

1 App. D. C. 261. (1893)

SHEPARD, J. * * * The case turns upon the construction of the two items of the will, which read as follows:

1. "I give, devise and bequeath to my dear mother, Jane Lowrie, as a slight compensation for her many acts of kindness to me, and for the maternal love she has always evinced for me (here follows a description of the lot in controversy) to have and to hold during her natural life, and after her death to my son, George R. Lowrie, upon his attaining his majority. In the event that my mother, the said Jane Lowrie, should die before my said son, George R. Lowrie, should arrive at the age of twenty-one years, then it is my will that my sister, Sarah J. Penicks, shall enjoy the rents, issues and profits of the said house and lot until my said son shall arrive at the said age of twenty-one years, and shall not be required to account for the same; and it is my will that in the event that my son, George R. Lowrie, shall die before my mother, Jane R. Lowrie, then in that event I devise and bequeath the said house and lot to my said sister Sarah J. Penicks, upon the death of my mother."

2. "All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my mother, to be disposed of

by her as she may elect, the real estate consisting of lots 30 and 31, in subdivision of lot 2, square 450, I give and devise to her in fee simple."

Defendant's demurrer to the bill was sustained, and from the decree of dismissal this appeal has been taken.

1. The first question is, What estate did Geo. R. Lowrie take by the terms of this devise? Was it a vested or a contingent remainder?

"A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed *in futuro*. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, *eo instanti* that it determines."

"A contingent remainder is where the estate in remainder is limited either to a dubious or uncertain person, or upon the happening of a dubious and uncertain event." *Poor v. Considine*, 6 Wall. 458.

It is also laid down in this case as established rules of construction (1) that "the law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested." (2) That "adverbs of time, as when, thereafter, from, etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest." (3) That "estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary." See also *McArthur v. Scott*, 113 U. S. 378.

Examining the will in the light of these well established rules, we cannot find that the testator intended that no interest should vest in his son, George R. Lowrie, unless he should live to become twenty-one years of age. Failing to find a clear manifestation of this intent, we must hold that it was the enjoyment only of the devised estate which depended upon this contingency.

The use of the words, "after her death," and "upon his attaining his majority", cannot be held to change this from a vested into a contingent remainder without violating one of the rules above recited. His mother, and his son, George R. Lowrie, presumably his only child, were the principal objects of the testator's bounty.

The fact that he made no provision for the support and education of the child during his minority may have proceeded from an implicit confidence that his mother, who had the revenues of his entire estate,

would discharge this obligation; or it may be attributed to a want of skill in the testator or the draughtsman of the will. Certainly, however, it does not tend to show that it was the intention of the testator to limit the commencement of any interest in him whatever to his arrival at majority. The will is inartificial and vague and uncertain in its meaning.

Another established rule in the interpretation of wills is, that where the intent in any item is not clear, or is of doubtful ascertainment, considered by itself, the will as a whole will be looked to in order to arrive at the true intent of the testator.

To hold that George R. Lowrie, took a vested remainder in the house and lot in controversy after the life estate of testator's mother, to come into enjoyment upon arrival at majority, and subject to defeasance by his death before hers, in which event it would pass to Sarah J. Penicks, is more in accordance with the general intention of the testator, as it appears to us from the whole will, than any other conclusion to which we have been urged.

We think it reasonably clear that the testator did not intend to die intestate as to any part of his estate. In the second item quoted above it will be observed that he devises and bequeaths all the residue of his estate to his mother, and specially describes the only remaining part of his real estate, which he gives to his mother also in fee simple.

Evidently, he must have supposed that the lot in controversy had been already devised in its entirety. If the contention of the appellee be correct, then by the death of George R. Lowrie, before attaining his majority, there was complete intestacy as to the reversion after the determination of the life estate. This view we have already pronounced untenable. * * *

SINTON v. BOYD.

19 Ohio St. 30; 2 Am. Rep. 369. (1869)

This action was brought by Kate J. Boyd, to recover an undivided seventh of a leasehold of certain houses and lots in Cincinnati, claiming title from her grandfather, John Boyd, who held the premises under a lease for ninety-nine years, renewable forever.

John Boyd died in October, 1832, leaving a will, wherein he be-

queathed his library to his sons or the survivors of them, and his household goods to his wife for life, and then to be divided among the daughters or the survivors of them. The residue of his property he disposes of in these terms: "I also give and bequeath unto my wife my estate, real, leasehold and personal, and all moneys and proceeds that may arise from the same, or that shall be remaining in the hands of my executors, after the payment of my just debts and funeral and administration expenses, to be used, employed and kept by her during her natural life for the support of herself and the support and education of my minor children. I also allow and direct that my wife shall, if she deems it proper, advance my sons, or any one of them, as they severally arrive at the age of twenty-one years, such sum of money as she may deem advisable, out of any surplus funds remaining in her hands not required for the support of herself and the support and education of my said minor children, she taking from them, respectively, for such advances, sufficient security for its repayment without interest. I also order and direct that my said wife shall draw from my said executors, on her own order, all such sum or sums of money as shall be in their hands at any time over the amount sufficient for the payment of my debts and the expenses aforesaid.

"I also order and direct that after the death of my wife all the estate and property, real, leasehold and personal, remaining (except as aforesaid), shall be by my executors, a majority or the survivors of them, divided equally among all my children, male and female, or the survivors of them; but in case the same, or any part of the same, in the opinion of my executors, cannot be fairly divided without injury thereto, then such part shall be by them sold and conveyed for the best price that can be had, and the proceeds divided as aforesaid; provided that any advances made by my wife to my sons, under the provisions for that purpose, shall first be deducted out of their respective portions; and if any shall have overdrawn his equal proportion by way of advance, the surplus shall be refunded, so as to make the portions to each equal.

"I also direct that my said executors, a majority or the survivors of them, shall lease or rent, on the best terms that can be had for the same, my houses and lots on the north side of Fifth Street, between Vine and Race streets, which were leased to me by Samuel Talbert and brother, the proceeds of which, after paying ground rents

and taxes, to be paid to and received by my wife for the purposes aforesaid."

The testator died leaving his widow, Mary Boyd, and eight children, one of which was James S. Boyd, who died, leaving a widow and one child, Kate J. Boyd, in 1836, prior to the death of the widow of the testator.

The leasehold was sold to Mary Boyd, the widow, with the consent of all the heirs except Kate J. Boyd, who was a minor. This leasehold she afterward disposed of, and it was in turn sold by her grantee to David Sinton, the plaintiff in error.

The plaintiff recovered a judgment below, and to reverse this judgment this petition in error is prosecuted.

DAY, J. Numerous perplexing questions have been presented in this case, but they are all founded on the assumption that Kate J. Boyd, derives title under the will of her grandfather, John Boyd. If this assumption be not well founded, there is an end of the case. This, then, is the prime question to be considered.

There is no express devise to grandchildren; nor is there anything in the will that will admit of that construction. The devise is to "children"; if, therefore, she has any interest in the estate in controversy she derives it by descent from her father, James S. Boyd, who was the child of the testator. If nothing was vested in him at the time of his death, she can inherit nothing from him.

The question, then, is whether an interest under the will vested in James S. Boyd. He survived the testator, but died before the widow, "after" whose death the property was to be divided. The property was to be divided equally among the testator's children, "or the survivors of them". It is necessary, therefore, to ascertain what was the point of time at which the survivorship was to be determined. Was it at the decease of the testator, or of his widow, who had a life interest in the property? This depends entirely upon the intention of the testator. In seeking that, we arrive at the same result, whether we apply the settled rules of the law, or are guided only by a study of the will itself.

The ancient holdings on this subject have been much modified by more recent decisions. Also the soundness of the distinction, taken between real and personal estate, has been questioned, until it has nearly or quite faded away. 2 Jar. on Wills, 650; Hawkins' Treat. 262.

The case of *Young v. Robertson*, 8 Jurist (N. S.), 825, decided in the house of lords in 1862, is directly in point. It was a will of real

estate and personal estate to trustees, to account to the widow during her life, and, after her death, to certain grand nephews and nieces, or their survivors.

In that case it was held, "upon the authorities, as well as upon principle," to be the rule, "that where there is a clause of survivorship, *prima facie* survivorship means the time at which the property to be divided comes into enjoyment—that is to say, if there be no previous life estate, at the death of the testator; if there be a previous life estate, then at the termination of that life estate:" or (as the rule is more briefly stated by the lord chancellor), that words of survivorship should be referred to the period "for the payment or distribution of the subject-matter of the gift." This is declared by him to be "the rule that is now finally established" in England.

This undoubtedly is the general rule recognized in this country, subject, of course, to such modifications as the paramount rule, giving effect to the intention of the testator, may require.

We think the general rule is the law applicable to this case, and that it is in harmony with the obvious purpose and intent of the testator, as gathered from the will.

Nor are we embarrassed by any question as to the state of the legal title to the leasehold in controversy during the life-time of the widow, for this court, in the case of *Boyd v. Talbert*, 12 Ohio, 212, held that it was vested in the executors. The legal estate, then, was not vested in the father of Kate J. Boyd, during his life.

Nothing is given directly by the will to the children, except the library to the sons, and the household furniture contingently to the daughters. Everything else is given to the wife, "to be used, employed and kept by her during her natural life for the support of herself and the support and education of the minor children." It is only that which may be "remaining" after her death that he directs to be divided among the children. Their interest, then, attaches at her death, and to that only which may be then remaining.

This view is strengthened by the provision in the will for the repayment of any advances the widow might make to the sons; nor does this provision conflict with that requiring the division to be made only among his children who might be alive at the period fixed for the distribution.

It is clear, then, that during the life of the widow no interest in this leasehold vested in the father of Kate J. Boyd. He died before the time for the distribution of the estate arrived; therefore, nothing vested in him or his heir, for the distribution was to be made only

among the "children" of the testator that might be surviving at the time mentioned in the will for the distribution.

The testator, it would seem from the record, was an educated man, and, from the manner in which he has frequently used the words, "survivors of them," in his will, we cannot but think that he fully understood their meaning, and that he intended to use them in their ordinary sense, when applied to his children, as he clearly does, in the same sentence, when applied to his executors.

He directs his "executors, a majority or the survivors of them," to make the division "equally among all my children, male and female, or the survivors of them." The distribution is to be made by the executors to the children, if all of each class are alive when the period for the division arrives; if not, then it is to be made by one class of survivors to the other class of survivors—that is, by those of one class then living to those of the other class then alive.

The testator has used apt words to confine the distribution of his property to his own children; and, in the absence of anything indicating a contrary intention, it is but reasonable to presume that he intended what is imported by their ordinary sense.

We are, therefore, constrained to hold that the plaintiff, in the court below, had no interest in the leasehold for which she brought suit. It follows that it is unnecessary to consider the other questions made in the case, and that the judgment of the court below must be reversed.

Note: In some states the time of survivorship is referred to the death of the testator. Thus in *Dougherty v. O'Brien*, 1 App. D. C. 148 it was held that the term "survivor" referred to the death of the testator rather than the death of the life tenant.

SEC. 3. FAILURE OF CONTINGENT REMAINDERS.

CRAIG v. ROWLAND.

10 App. D. C. 402. (1897)

MR. CHIEF JUSTICE ALVEY delivered the opinion of the court:

This is an action of ejectment brought to recover all of square No. 747, in the City of Washington, in the District of Columbia, and in which square the plaintiffs claim the fee simple estate, and of which they were heretofore, to wit, on the 3d of January, 1876, lawfully possessed, when the defendant, who is now in the actual occupation thereof, entered the same and unlawfully ejected the plaintiffs therefrom, and unjustly detains the same. The plaintiffs also claim for mesne profits to the amount of \$12,000.00.

The defendant pleaded the general issue of not guilty, and upon trial the verdict of the jury, by the direction of the court, was for the defendant. A bill of exception was taken by the plaintiffs, and the case has been brought to this court for review. The principal question in the case is as to the true construction of the will of John A. Wilson, deceased, and the rights of the plaintiffs thereunder.

John A. Wilson died in this District in 1841, leaving a last will and testament, duly executed to pass real estate, and which was duly admitted to probate. He left no lineal descendants, but he left two sisters surviving him, as his only heirs at law, Mrs. Burgess and Mrs. Burche. Mrs. Burgess died in 1843, intestate, leaving Dr. John E. Craig, her only child and heir at law. The plaintiffs are the children of Dr. John E. Craig, who died in 1874.

The testator, John A. Wilson, by the first clause in his will, devised as follows:

"First, I give, bequeath and devise to my sister, Mrs. Henrietta Burgess, and her son, Dr. John E. Craig, as joint tenants during their joint lives, and the life of the survivor of them, the lands and premises on which I now reside, called "Cazanova," including all my estate and interest in all the lands now enclosed by me lying in the city of Washington between I street north and the northern boundary line of the said city, and between Second and Third streets east, and if the said John E. Craig shall hereafter marry and die, leaving lawful issue of such marriage or marriages, or the lawful descendants of such children, and such lawful issue, or their lawful children shall be in being at the time of the death of the survivor of the said John

E. Craig and Henrietta Burgess, then I give, bequeath and devise to such issue and children, the said lands and premises to them, and their heirs in fee simple, but if the said John E. Craig shall die without having been married, and without leaving such lawful issue surviving him, then the said lands and premises to go to my right heirs."

This clause was followed by certain other bequests to Mrs. Burgess and her son, Dr. John E. Craig, and the testator concluded such devises and bequests, by declaring that "the foregoing bequests and devises to the said Henrietta Burgess and, John E. Craig are to be in full of and in lieu of all claims they or either of them may have in any manner or form, whether as heirs at law, or otherwise, upon my estate, or any part thereof, and to be carried into effect only upon the condition of their and each of them releasing all claims and demands as aforesaid."

The will then contains several devises and bequests to other persons, and concludes with a residuary clause, whereby the testator declared, that "the rest, residue, and remainder of my estate, real, personal and mixed, I give, devise, and bequeath, subject to the charges hereinbefore contained, and not otherwise, to my sister, Susan M. Burche, her heirs and assigns, saving and excepting therefrom the leasehold estate," etc.

It is shown that Dr. John E. Craig was married in 1847, and the dates of the births of his several children, the plaintiffs in this case, are as follows: Rosa Craig (now Rosa Cover), November 20, 1848; Robert Craig, July 27, 1850; Clarence Craig, October 15, 1852; Casper L. Craig, December 11, 1855; and Lauretta Craig (now Lauretta Boyd), October 10, 1858. All these children survived their father, who died, as we have before stated, in 1874, and they are all still living and plaintiffs in this case.

On October 21, 1848, just one month prior to the birth of the first child of Dr. John E. Craig, Mrs. Susan M. Burche, by deed of bargain and sale, conveyed to Dr. John E. Craig, his heirs and assigns, all her right, title, claim, and interest, of whatever nature or kind, "whether in possession, reversion, or remainder, or as heir or devisee of John A. Wilson, deceased," in and to all the land and premises devised to Henrietta Burgess and John E. Craig, and the survivor of them, etc., by the last will and testament of the said John A. Wilson, deceased, etc. And on December 1, 1848, Dr. John E. Craig and wife, by deed of bargain and sale, with covenant for warranty, conveyed the same lands and tenements described in the deed from Mrs. Burche, to Samuel H. Laughlin, and by mesne convey-

ances the property has come to the possession of the defendant, James H. Rowland. There is no pretense that there were real assets of the estate of John E. Craig that descended to his heirs that would make his children liable on the covenant for warranty in his deed to Laughlin.

Upon the devise for life in joint tenancy to Mrs. Burgess and her son, with limitation in fee to the children or lawful descendants of the children of the son, no question is presented of the application of the Rule in Shelley's Case. That rule, it is conceded, has no application to this case, and therefore it is not pretended by the defendant that the father, John E. Craig, took under the devise to himself and his mother more than a life estate in the property devised. *Daniel v. Whartenby*, 17 Wall. 639. Upon the death of Mrs. Burgess in 1843, John E. Craig, her son and joint devisee for life, became sole tenant for life, and the limitation over to his children and their descendants surviving at the time of the termination of the life estate presents the plain case of a contingent remainder to the children or descendants surviving; and the limitation over to the right heirs of the testator, in default of persons to take, was simply retaining the reversion which would descend to the heirs of the testator if not otherwise disposed of. The heirs in such case take by descent and not by devise as purchasers. *Sugden's Edition of Gilbert's Uses and Trusts*, p. 32; *Godolphin v. Abingdon*, 2 Atk. 57; *Counden v. Clerk*, Hobart, 29; *Fearne, Cont. Rem.* 50, 51. When, says Mr. Preston, "the limitation is to the right heirs, *eo nomine*, of the testator, the gift is void and the fee will descend." 2 *Prest. on Est.* 17; *Parsons v. Winslow*, 6 Mass. 178; *Ellis v. Page*, 7 Cush. 161.

This being the result of the reservation to the right heirs of the testator, the residuary devise to Mrs. Burche, by which the rest, residue and remainder of the estate of the testator was given to her, embraced this reversion to the right heirs of the testator. It is a settled principle that wherever there is an executory devise or a contingent remainder of real estate, and the freehold or inheritance is not in the meantime disposed of, the freehold or inheritance descends to the testator's heirs-at-law, to abide the event upon which the contingency may terminate. *Purefoy v. Rogers*, 2 Wm. Saund. 382, and note (1); *Carter v. Barnardiston*, 1 P. Will. 516, 517; *Gore v. Gore*, 3 P. Wms. 28; *Stephens v. Stephens*, Cas. Temp. Talb. 228; *Fearne, Cont. Rem. and Ex. Dex.* 537-543. The cases all seem to agree that a residuary devise, such as we have in the will before us, will include every reversionary interest, however remote, which

is undisposed of by the provisions of the will, whether the same be a reversion remaining after an interest created by the will or otherwise. *Brigham v. Shattuck*, 10 Pick. 308; *Harper v. Blean*, 3 Watts. 471; *Young v. Young*, 45 N. Y. 258. In the event of a failure of the remainder to vest, by reason of the default of issue or children of John E. Craig, there could have been no doubt of the right of Mrs. Burche to take under the residuary devise to her; and if so, it is equally clear that she took the reversion subject to the happening of the contingency.

The reversion in the property, reserved by the devise, having passed to Mrs. Burche by the residuary clause of the will, the question is, what was the effect, if any, of her deed of bargain and sale, dated the 21st of October, 1848, to John E. Craig, the surviving devisee for life, upon the contingent remainder limited to the children of Craig, the devisee for life?

It is contended for the defendant that the operation of the deed from Mrs. Burche to Craig was to merge the life estate, then in Craig alone, into the estate of inheritance conveyed by the deed, and thus by the union or coalition of the particular estate and the inheritance the intermediate contingent remainder, dependent upon such particular estate, was destroyed. In this way, it is supposed, the particular life estate was terminated, by being merged in the reversion in fee, and consequently there was no longer any particular estate of freehold to support the contingent remainder to the children. For the learning upon this particular question, see the case of *Purefoy v. Rogers*, 2 Wms. Saund. 386, 387, and notes. But whether the principle contended for has any application to this case depends upon another consideration.

As we have seen, the deed of bargain and sale from Mrs. Burche to Craig bears date the 21st of October, 1848, and it was not recorded to give it effect until June 1, 1850. It appears that Rosa Craig, now Rosa Cover, one of the plaintiffs and the eldest of the children of John E. Craig, was born November 20, 1848, just one month after the execution of the deed to her father, and she was, of course, at the date of the deed, *en ventre sa mere*. The next oldest child was born July 27, 1850, within less than two months after the deed was recorded.

Now, it is well settled, both in England and in this country, that a child *en ventre sa mere* is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of dis-

tribution. 4 Kent. Com. 249. The cases are full to this effect; and an infant *en ventre sa mere*, who by the course and order of nature was *in esse* before the date of the deed, comes clearly within the description of lawful issue or child of John E. Craig. *Reeve v. Long*, 1 Salk. 227; *Doe v. Clarke*, 2 Hen. Black. 399; *Pearce v. Carrington*, L. R. 8, Ch. App. 969; *Chrisfield v. Storr*, 36 Md. 129, 145. The child being *in esse* and capable of taking the estate, if the estate in remainder vested upon coming into being of the children of John E. Craig, the estate had been changed from a contingent into a vested remainder, before the execution of the deed by Mrs. Burche, and hence was in no manner affected by that deed.

It is argued, however, for the defendant, that the period for the vesting of the estate in remainder was not the coming into existence of a child or children of John E. Craig, but the death of the latter, leaving issue or children, or their descendants, surviving him. But we perceive nothing in the terms of the devise in remainder that requires such construction. The devise should be so construed as to vest the estate at the earliest possible moment, without violation of the manifest intention of the testator. In this case there is nothing on the face of the will to indicate an intention or purpose on the part of the testator to delay the vesting of the estate in remainder to the time of the termination of the life estate. And in the absence of such plain indication, the rule of construction is that the estate should be held as vested from the earliest period possible.

The devise is, that if John E. Craig should marry and die, leaving lawful issue of such marriage, or the lawful descendants of such children, and such lawful issue, or their lawful children, shall be in being at the time of the death of the survivor of the devisees for life, then the testator devised to such issue and children, and their heirs, in fee simple, the land and premises; but if John E. Craig should die without leaving such lawful issue surviving him, then the lands to go to the right heirs of the testator. In all the conditions here prescribed to the enjoyment of the estate by the issue or descendants of such issue of the devisee for life, there is nothing that precludes the vesting of such estate during the continuance of the life estate. On the contrary, there is strong reason for adopting the earliest period for vesting that can be done, in cases like the present; for thereby protection is given the interest in remainder, as the devisee for life may be under a temptation to frustrate the will of the testator, as was attempted in this case, by destroying the con-

tingent remainder, by getting in and uniting the reversion and life estate in himself.

This question as to the time of vesting of estates devised in remainder was very fully examined by the Supreme Court of the United States in the case of *Doe v. Considine*, 6 Wall. 458, which would seem to be entirely conclusive of the question here. The cases therein cited with approval would seem to cover this case to the exclusion of all doubt. In that case it was held that estates in remainder vest at the earliest period possible, unless there be a clear manifestation of the intention of the testator to the contrary. And in furtherance of this principle, the expression, "upon the decease of A I give and devise the remainder", was construed to relate to the time of the enjoyment of the estate, and not to the time of the vesting in interest.

In 2 *Jarman on Wills* (5th Am. Ed.), Ch. 25, pp. 406-7, where most of the authorities upon this subject are collated, in the text and the notes, the author says. "It may be stated, as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in the event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting;" and many examples are given to illustrate the principle.

In the case of *Duffield v. Duffield*, 1 Dow. & Cl. 311, in the House of Lords, Best, C. J., said that in the construction of devises of real estate, "it has long been an established rule for the guidance of the court, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will." And to accomplish this, words of seeming condition are, if possible, held to have only the effect of postponing the right of possession; and if the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, so as to confer an immediate vested estate, subject to be divested on the happening of the contingency. *Hawkins on Wills*, 237.

It is laid down in all the books of authority that the distinction between a vested and a contingent remainder does not depend on the contingency on which it is to vest in possession, but on that on which it is to vest in interest. Hence, Mr. Fearne (*Cont. Rem.* 215, 216, 217)

lays it down as an unquestionable proposition, "that it is not the uncertainty of ever taking effect in possession, that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

In this case, the question is, whether the remainder to the issue or children, or their descendants, of John E. Craig was contingent until the death of John E. Craig, the devisee for life, or vested on the birth or coming into being, so as to enable it to take, of one of such children, with a liability to open and let in any after born child or children, embraced by the devise in remainder. This question would seem to be of easy solution, upon the principles we have stated. There being no condition precedent or clearly expressed intention in the devise to prevent the vesting of the estate in the child or children as they came into being, it follows, upon well settled principles, that the remainder limited to the children, or their descendants, of John E. Craig, became a vested remainder in fee in the first child born or that came into being and capable to take, and did not wait for the death of the father; and this remainder thus vested was subject to open and let in the after born children. And if such child or children and their descendants had all died in the lifetime of John E. Craig, the fee simple estate would have reverted to the heirs of the testator and formed part of the residue of his estate, and passed under the residuary clause of his will. *Doe v. Considine, supra*; *Doe v. Perryne*, 3 T. Rep. 484, opinion of Boller, J.; *Right v. Creber*, 5 B. & Cr. 866; *Doe v. Hopkinson*, 5 Q. B. 223; *Carver v. Jackson*, 4 Pet. 1, 90.

The estate limited in remainder having been changed or converted from a contingent into a vested remainder, upon coming into being of the first child of the devisee for life, which happened before the execution of the deed of bargain and sale by Mrs. Burche to the devisee for life, it follows that the estate limited in remainder was in no manner affected by such deed. And as to the deed subsequently made by the devisee for life to Samuel H. Laughlin, that did not affect the estate in remainder, though it professed to convey the estate in fee; but only conveyed such estate as the grantor could lawfully convey, and that was a life estate in the premises,

It follows that the instruction of the court below, directing a verdict for the defendant was erroneous; and therefore the judgment must be reversed, and a new trial awarded, and it is so ordered.

Note: Those who become members of the class after the termination of the particular estate cannot take the estate for the reason that the remainder must vest at the very latest at the time the particular estate terminates. This rule is based upon the requirement of the common law that the freehold cannot be in abeyance. *Demill v. Reid*, 71 Md. 175.

SEC. 4. ACCELERATION OF REMAINDER.

KEY v. WEATHERSBEE.

43 S. C. 414; 49 Am. St. Rep. 846; 21 S. E. 324. (1895)

McIVER, C. J. * * * It will be sufficient to state here that the testatrix by her will specifically devised certain real estate to the defendants Charlee Ann Weathersbee and her husband, Floyd W. Weathersbee, for their joint lives, and to the survivor of them during the life of such survivor, with remainder to the other three defendants, Bessie, Jane, and James Moore Weathersbee; but as it is conceded that the said Floyd W. Weathersbee was a subscribing witness to the will, as well as to the two codicils, the question is as to the effect of this conceded fact upon the provisions of the will just stated, under the provisions of section 1991 of the Revised Statutes above referred to. That section reads as follows: "No subscribing witnesses to any will, testament, or codicil shall be held incompetent to attest or prove the same by reason of any devise, legacy, or bequest therein in favor of such witness, or the husband or wife of such witness, or by reason of any appointment therein of such witness, or the husband or wife of such witness, to any office, trust or duty; and such devise, legacy, or bequest shall be valid and effectual, if otherwise so, except so far as the property, estate, or interest so devised or bequeathed shall exceed in value any property,

estate, or interest to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will, testament, or codicil, but to the extent of such excess, the said devise, legacy, or bequest shall be null and void, and such appointment shall be valid, if otherwise so, but the person or persons so appointed shall not, in such case, be entitled by law to take or receive any commission or other compensation on account thereof."

The circuit judge held that the effect of this statutory provision was to destroy or forfeit all of the interest that Floyd W. Weathersbee would otherwise have taken under the will, and to cut down the interest of Charlee Ann to an amount not exceeding in value the interest which she would have taken as heir at law if there had been no will, which, it is conceded, would have been one twenty-fifth part of the estate. And he further held that this did not destroy the interest in remainder intended for the children of Charlee Ann, but that the effect was simply to accelerate the remainders, which, therefore, took effect at once. The appellants, on the other hand, contend that the precedent life estate having been destroyed, the remainders were defeated, and the estate of the testatrix became divisible amongst the heirs at law as intestate property, and the main question in the case is, which of these two views is correct.

Before proceeding to the consideration of that question, it may not be amiss to say, simply to avoid committing the court upon the point, that it may, possibly, be open to question whether the circuit judge was right in holding that the effect of the statute was to destroy all of the interest of the husband, Floyd W. Weathersbee, in the estate intended to be devised to him, inasmuch as the language of the statute is not that a devise to a witness shall be void to the extent of its excess in value over the interest which "such witness" would take had there been no will, but the language is, "to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will." Now, as the wife of the witness, Floyd W. Weathersbee, would, confessedly, be entitled, upon the failure to establish the will, to one twenty-fifth of the whole, it is, at least open to question whether the interest intended to be given to Floyd W. Weathersbee by the will is entirely defeated by the statute, or only to the extent of its excess in value over the one twenty-fifth part of the estate. But as there is no exception to the ruling of the circuit judge as to this particular point, and as it is not really necessary or even important to the solution of the question which we are

called upon to decide, we do not wish to be regarded as deciding or even expressing any opinion distinctly upon that question.

Recurring, then, to the main question, we think it is satisfactorily determined in favor of the view taken by the circuit judge by the case of *Jull v. Jacobs*, L. R. 3 Ch. Div. 709, cited both by the judge and the counsel for respondents. That case is not distinguishable from the present, for in that case the testator devised both real and personal property to his daughter, "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age", and it was held that, in respect to the real estate, the gift to the children was strictly a vested remainder; that the construction as to the personalty followed the rule as to the realty, and the gift to the daughter being void, on account of her having attested the will, the gift to the children was accelerated and took effect immediately. Malins, V. C., in delivering the opinion of the court, after showing that the clause of the will above recited created a vested remainder in the children, proceeded as follows: "But then comes the question whether the wills act, by taking away the life estate of the daughter, causes an intestacy during her life so as to carry the property to the heir at law, or accelerate the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life, but if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases; they are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that if he called in his daughter to be an attesting witness, the very gift he made her would absolutely fail. Now, he has postponed his grandchildren—that is, his daughter's children—to the daughter, solely because the daughter was to take for life, and if he had known that she could not take for life, he would not have postponed the children until after her death; he would not have left her and her family destitute in the meantime. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life, and if she could not have it for life, the children would have had it immediately. That would be the conclusion I should come to from the reason of the thing, without the decisions. But the decisions are all the same way." And the learned vice-chancellor proceeds to cite the cases to that effect. That case is so exactly in point, and the reasoning employed

is so directly applicable to the case under consideration, that it would seem to be unnecessary to say more.

It is true that, so far as we are informed, we have no case in this state directly on the point. But we do find cases cited by respondent's counsel which, by analogy, support our conclusion. In *Lesly v. Collier*, 3 Rich. Eq. 128, it is said by Dargan, Ch., that: "If there be a legacy to one for life, with remainder to another, which remainder on the death of the testator would be direct and vested, and not contingent, and the person intended to be the tenant for life dies in the lifetime of the testator, I think it cannot be doubted that, in such a case, the legacy does not lapse, but, on the death of the testator, goes at once to him, who in the scheme, of the legacy, was intended to be only a remainderman." The same doctrine is laid down by Desausure, Ch., in *Dunlap v. Dunlap*, 4 Desaus. Eq. 314. To the same effect, see *Bell v. Towell*, 18 S. C. 101.

Now, as a will speaks at the death of the testator, it is clear that in these cases no precedent life estate was ever really created, inasmuch as the proposed life tenant was dead at the time the will took effect, for a devise or bequest to a person deceased at the time is void *ab initio* (*Pegues v. Pegues*, 11 Rich. Eq. 554), except in the case specially provided for by the act of 1789; and hence the position so strenuously urged by counsel for appellants, that it is only in a case where a precedent life estate has been created which has subsequently been defeated or destroyed that the doctrine of the acceleration of the remainder can be applied, cannot be sustained. Besides, in the case of *Lomas v. Wright*, 2 Mylne & K. 769, cited by the counsel for respondents, it seems to have been held that where a limitation is void, being to a monk for life, who was regarded as civilly dead, the estate will not revert to the grantor, but the next limitation in remainder will take effect. And in *Avelyn v. Ward*, 1 Ves. Sr., 420, recognized in *Doe ex dem. Wells v. Scott*, 3 Maule & S. 300, as well as by our own court in *Witherspoon v. Watts*, 18 S. C. 411, Lord Hardwicke said: "That he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." See, also, 2 Jarman on Wills, Perkins' ed., 702, where it is said, in effect, that where an estate is given to a person for life, with a vested remainder in another, such remainder

"takes effect in possession whenever the prior gift ceases or fails, in whatever manner."

We are, therefore, of opinion that there was no error on the part of the circuit judge in the view which he took of the main question in the case. This disposes of the first, second, third and sixth exceptions. * * *

Note: There is an extensive note upon the subject of Acceleration of Contingent Remainders in 5 A. L. R. 473.

ROBISON v. FEMALE ORPHAN ASYLUM OF PORTLAND
ET AL.

123 U. S. 702; 8 Sup. Ct. 327; 31 L. Ed. 293. (1887)

MATTHEWS, J. Robert I. Robison, formerly of Portland, in the State of Maine, died on the thirteenth day of June, 1878, at that time a citizen of the State of New York and resident of Brooklyn, leaving a last will and testament, which was subsequently admitted to probate in the surrogate's court of Kings county, New York, and duly recorded on December 27, 1878. Letters testamentary thereon were on the same day issued and granted to Jane S. Robison, his widow, who alone qualified as executrix. The testator, at the time of his death, was seized of real estate in the city of Portland, and also possessed of a considerable amount of personal property. The following is a copy of the will:

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and publish this my last will and testament. * * * *Thirdly*, I further will that she (Jane S. Robison) may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. *Fourthly*, it is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison, aforesaid, that they, or the one that may be then living, shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the Widows'

Wood Society, and one-third of the income to the Home for Aged Indigent Women, all of the city of Portland, and State of Maine. *Lastly*, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament."

On December 29, 1881, the present bill in equity was filed by Jane S. Robison, as widow and executrix, for the purpose of obtaining a construction of the will, the defendants being charitable institutions named therein, and the only other parties in interest, Ann Smith and Eleonora Cummings Robison, the persons mentioned in the fourth item of the will, having both died before the testator. It was contended on the part of the complainant that, in consequence of the lapse of the devise and legacy to Ann Smith and Eleonora Cummings Robison, the bequest to the defendants never took effect, and that consequently the complainant was entitled to the estate absolutely, by virtue of the devise to her, or, in the alternative, because the testator had died intestate as to that part of the estate mentioned in the fourth subdivision of the will. The decree of the circuit court, however, was "that the complainant is entitled only to the income of the estate during her natural life, and that the fourth subdivision of the last will and testament of the testator is operative and valid, and was so at the time the will took effect, and that the defendant corporations acquired by virtue thereof the right, from and after the death of the complainant, to the perpetual income of the said estate." To review that decree the present appeal has been brought.

It is now contended in argument, on the part of the appellant, (1) that the language of the third subdivision of the will, considered by itself, is sufficient to give to her the real estate in fee and the personal estate absolutely; (2) that the bequest in the fourth subdivision of the will to Ann Smith and Eleonora Cummings Robison is contingent on one of them surviving both the testator and the complainant, and, as the event happened, never became vested; (3) that the bequest to the defendants is dependent upon the vesting of the bequest to Ann Smith and Eleonora Cummings Robison, being affected by the same contingency, namely, one of them surviving the testator and the complainant; and (4) that, if the interest of the complainant under the third subdivision of the will must be limited to a life-estate, as the bequests contained in the fourth subdivision have lapsed, or cannot take effect, the testator died intestate in respect to that portion of his estate.

In support of the proposition that the bequest to the defendants must

fall with that to Ann Smith and Eleonora Cummings Robison, counsel for the appellant rely upon the rule laid down by Mr. Jarman in the following language: "When a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be that, if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them." 1 Jarm. Wills, (5th Amer. Ed. by Bigelow,) *831.

But the rule referred to is one of construction merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "*First*. Where the words of contingency are referable to and evidently spring from an intention which the testator has expressed in regard to that estate by way of distinction from the others. *Secondly*. The contingency is restricted to the particular estate with which it stands associated where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." Id. 831, 832. Under the second of these classes is ranged the case of Boosey v. Gardener, 5 De Gex, M. & G. 122. In that case the testator bequeathed to his two sisters the interest of his long annuities for their lives, and, in case of one or both of their deaths before his, he gave the whole interest in long annuities to his brother for life; at his death, (that is, the death of the brother,) the testator gave half of the capital to his niece, A., his brother's daughter, to help to bring her up, till she attained the age of 21, then to receive half the capital; likewise, the testator bequeathed to his nephew, S., his brother's son, if no further family, his other half; in case of further family to be

divided between them, not dividing the half left to A. It was held by TURNER, L. J., that the bequest to the niece and nephew was not contingent upon the death of the sisters in the testator's life-time, although the preceding estate for life to the brother was. But little aid, however, in such cases is to be derived from a resort to formal rules, or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention.

In applying this principle, the supreme judicial court of Massachusetts, in the case of *Metcalf v. Framingham Parish*, 128 Mass. 370, 374, speaking by GRAY, C. J., said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture; but if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Ferson v. Dodge*, 23 Pick. 287; *Towns v. Wentworth*, 11 Moore, P. C. 526; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Greenwood v. Greenwood*, 5 Ch. Div. 954."

Looking into the present will, therefore, for that purpose, we find it evident that the testator did not intend by the third subdivision of his will to give to his widow an interest in his estate beyond her life. This conclusion is not based on any distinction between a bequest of the income of the estate and a bequest of the body of the estate itself; nor do we lay any stress on the declaration in that clause, "she having the right to spend the same, but not to have it accumulate for her heirs," although that language does afford an indication in support of the conclusion. But whatever force, standing by itself, the third subdivision might have, it is clear that the testator intended, in the event that his sister, Ann Smith, and Eleonora Cummings Robison should survive both himself and his wife, that they should have an estate for life, beginning at the death of his widow. That would necessarily limit the widow's estate to her own life. But as the estate given by the fourth clause to Ann Smith and Eleonora Cummings Robison for their lives was contingent on the event that one or the other of them should be living at the death of the wife, the question remains whether that contingency also entered into the

bequest in remainder to the defendants. The fact that Ann Smith and Eleonora Cummings Robison died before the testator, whereby the legacy to them lapsed altogether, is not material, because, if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally, or on the death under particular circumstances, and whether the legacy be immediate or in remainder. It was so held in *Willing v. Baine*, 3 P. Wms. 113, where the bequest was to A., but if he died under 21, to B.

In *Humberstone v. Stanton*, 1 Ves. & B. 388, it was said: "It seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing v. Baine*, legacies were given to children, payable at their respective ages of twenty-one; and if any of them died before that age, the legacy given to the person so dying to go to the survivors. One having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors." The argument was that the bequest over could not take place, as "there can be no legacy unless the legatee survives the testator, the will not speaking until then; wherefore this must only be intended where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of 21. It was, however, held, and is now settled, that in such a case the bequest over takes place." It follows, therefore, that unless it appear on the face of the will that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed.

The scheme and intention, therefore, of the present will seems to us, considering the third and fourth subdivisions together, to be this: An estate for life to the testator's widow; an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent on one of them surviving the widow, with the ultimate remainder in fee as to the real estate, and absolutely as to the personalty, in the defendants. The language of the contingency in the fourth clause, in our opinion, affects only the intermediate life-estate of Ann Smith and

Eleonora Cummings Robison; it being, we think, the plain intention of the testator to give to his widow the estate in question only for her life, and not to die intestate as to any portion of the estate, and to limit the contingency only to the gift to Ann Smith and Eleonora Cummings Robison. It is true that the ultimate gift to the defendants is described as commencing "at their death," that is, at the death of Ann Smith and Eleonora Cummings Robison; but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended. Certainly, those words are not to be construed so as to require that the gift to the defendants shall take effect at the death of Ann Smith and Eleonora Cummings Robison, irrespectively of the prior decease of the widow. The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants.

The decree of the circuit court is accordingly affirmed.

SEC. 5. TRANSFER OF CONTINGENT REMAINDERS.

DOE d. CHRISTMAS v. OLIVER.

5 M. & R. 202; 2 Smith's Leading Cases 417. (1828)

BAYLEY, J. This case depended upon the effect of a fine levied by a person who had a contingent remainder in fee. The short facts were these: Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for a term of ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living; so that the contingency, upon which the limitation of the estate to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term of ninety-nine years was vested. It was admitted in argument,

on the part of the defendant, that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them, by estoppel; but it was insisted that such fine operated by way of estoppel only; that it, therefore, bound only parties and privies, not strangers: that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy but a stranger; and that, as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. In support of this position reliance was placed upon the latter part of the judgment delivered by me in the case of *Doe d. Brune v. Martyn*, and that part of the judgment certainly countenances the present defendant's argument. But the reasoning in that case proceeds upon the supposition that a fine by a contingent remainderman operates by estoppel, and by estoppel only; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision; whether it operated by estoppel only, or whether it had a further operation, was perfectly immaterial in that case; and the point did not there require that investigation which the discussion of this case has rendered necessary. We have, therefore, given the subject that further consideration which it required, and we are satisfied, upon the authorities, that a fine by a contingent remainderman, though it operates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied.

The first authority which it is necessary to notice is Rawlin's case. There, Cartwright demised land, not his own, to Weston, for six years. Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten years. It was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion, and that when Rawlins re-demised to him then was his interest bound by the conclusion; that when Cartwright re-demised to Rawlins, then was Rawlins concluded also. Rawlins, indeed, was bound as privy, because he came in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright got the land, his interest in it was bound. In *Weale v. Lower*, Pollepf. 54, the case was thus: Thomas, a contingent remainderman in fee, demised to Grylls for five hundred years, and levied a fine to Grylls for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and, whether this demise was good as against the heir of

Thomas, was the question. It was argued before Hale, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas; that the estate, which came to the heir when the contingency happened, fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited Rawlin's case, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that, as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord Chief Justice Hale, Wild, Ellis, and Windham, Justices, and they all agreed that the fine at first enured by estoppel; but that, when the remainder came to the conusor's heir, he should claim in nature of a descent, and, therefore, should be bound by the estoppel; and then the estoppel was turned into an interest, and the conusee had then an estate in the land. In *Trevivan v. Lawrence*, Lord Holt cites 39 Ass. 18, and speaks of an estoppel as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards*, 3 P. Wms. 371 cited by Mr. Preston, Lord Talbot, must have considered a fine by a contingent-remainderman as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. There, lands were devised to A. and B. and the survivor, and the heirs of such survivor, in trust to sell. Upon a reference to the master, he reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the Master's report, Lord Talbot held that a fine by the trustees would pass a good title to the purchaser by estoppel; for, though the fee was in abeyance, one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped, by reason of the fine by the ancestor, from saying *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. On the following day he cited the case of *Weale v. Lower*, which I have before cited. Now, whether Lord Talbot was right in treating the fee as being in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did so consider them; and he must have had the impression that the fine would have operated, not by estoppel only, but by way of passing the estate to the purchaser, because unless

it had the latter operation as well as the former, it would not pass a good title to the purchaser.

Mr. Fearne, in his work on Remainders, c. 6, s. 5, says, "We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale v. Lower*, he says, "It was agreed that the contingent remainder descended to the conusor's heirs; and though the fine operated at first by conclusion only, and passed no interest, yet the estoppel bound the heir: and that, upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied."

Upon these authorities, we are of opinion that the fine in this case had a double operation—that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; and that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having a right under him, exactly what he would have had in case the contingency had happened before the fine was levied.

Judgment for the Plaintiff.

WATSON v. SMITH.

110 N. C. 6; 28 Am. St. Rep. 665; 14 S. E. 640. (1892)

Agreed case involving the construction of a clause in the will of J. O. Watson, which read as follows: "Lastly, all the rest and residue of my estate, real and personal, not herein and hereby disposed of with effect, I do hereby devise and bequeath as follows: After paying all of my just debts, legacies, and funeral expenses, and the charges for settling my estate and executing this will, I give the whole unto my nephew, John W. B. Watson, to have and to hold to him and his use for and during the term of his life, and at his death the said estate, both real and personal, shall belong to such child or children of the said John W. B. Watson as may be living at his death, or the issue of any child who may pre-decease him. And if the said John W. B. Watson should die without issue living

at his death, then the said estate, both real and personal, shall belong in fee-simple and be equally divided amongst George W. Watson, William H. Watson, Henry B. Watson, and Owen L. Dodd, and their heirs forever." Judgment for the plaintiff, from which the trustee appealed.

SHEPHERD, J. The particular provision in the will of J. O. Watson, the construction of which is involved in this controversy, is by no means a stranger to this court. In *Watson v. Watson*, 3 Jones Eq. 400, the court declared that the land, being limited by way of contingent remainder to persons not *in esse*, it had no power to order a sale for the purpose of converting it into more beneficial property. In *Watson v. Dodd*, 68 N. C. 528, it was held that the contingent interest of one of the devisees, expectant upon the death of the life tenant without issue, could not be subjected to the payment of his debts. The question now presented is, whether the interests of such devisees are assignable by deed, either in law or equity. The limitation was to John W. B. Watson for life, and at his death to such child or children of the said John as might then be living; but should he die without issue living at his death, then to be equally divided between George W. Watson, William H. Watson, Henry B. Watson, and Owen L. Dodd, and their heirs forever. What interests did these last-named persons take under the will? In the first of the cases above cited, it was said that the limitation was to John for life, with a contingent remainder to such of his children as might be living at his death, and that the persons above mentioned were to take by way of executory devise in the event of a failure of issue upon the death of the life tenant.

In the latter case it was suggested, though not decided, that the limitation to these persons was a contingent remainder. In this view, we entirely concur. An executory devise is strictly such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules in limitations in conveyances at common law, but it is never construed to be such if it is possible that it should take effect as a remainder: *Fearne on Contingent Remainders*, 368, 393. The limitation in question does not take effect after the limitation to the expectant issue, but upon the regular determination of the particular life estate, and therefore must be a remainder. It is true that the limitation to the issue is also a remainder in fee, and it is a rule of law that no remainder can be limited after a fee, but, as we have seen, the other limitation is not expectant upon the determination of the estate limited to the issue,

but upon the determination of the estate of the life tenant without issue.

In *Goodright v. Dunham*, 1 Doug. 265, the will was in these words: "I give my messuage, etc., to my son J. S. for life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them." It was determined that "both devises were contingent remainders in fee." See also *Loddington v. Kyne*, 1 Ld. Raym. 203; *Bannister v. Carter*, 3 Bro. P. C. 64. The case of *Goodright v. Dunham*, 1 Doug. 265, is exactly in point. As in our case, the limitation is of two concurrent fees by way of remainder as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and it is called a limitation by way of remainder on a contingency with a double aspect.

In deference to the discussion of counsel, and in view of the apparently conflicting judicial utterances upon the subject, we have deemed it best to determine the precise character of the limitation, but we really do not see how it is essential to a proper disposition of this case. Taking the limitation to be either a contingent remainder or an executory devise, we are of opinion that the interest of George W. Watson and others was at least "a possibility coupled with an interest" *Watson v. Dodd*, 68 N. C. 528; and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity. In the above case, Pearson, C. J., seems to consider that it is an executory contract, which will be specifically enforced upon the happening of the contingency upon which the remainder is to vest. It is possible that he had in mind the assignment of a mere possibility, such as the expectancy of an heir at law, as in *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434. In *Bodenhamer v. Welch*, 89 N. C. 78, it is held that such an interest may be assigned (we suppose that an equitable assignment is meant), and we are of the same opinion; but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue, and this is all that is necessary (according to the stipulation in the case agreed) to entitle the plaintiff to the relief he asks.

The plaintiff, the life tenant, has, by the assignment, acquired an equitable right to the interest of the said remaindermen. He is a single gentleman, about eighty years of age, and the defendant is will-

ing to take the risk of his marrying and leaving issue, provided the assignment of the remaindermen is effectual to bind them and their heirs. We have seen that such is its effect, and the judgment must be affirmed.

Note: In the case of *Foster v. Hackett*, 112 N. C. 546; 17 S. E. 426, there was a devise to life tenants with remainder to the issue of both or either; but on failure of issue at the time of the death of the survivor of the two, to the "lawful heirs" of the testator. There was a deed given by one of the daughters of the testator during the lifetime of the life tenants under which the plaintiff claimed. The court held that this deed with warranty took effect upon the death of the life tenants without issue, so as to pass the grantor's title by estoppel to the grantee.

SEC. 6. RULE IN SHELLEY'S CASE.

BAILS v. DAVIS.

241 Ill. 536; 89 N. E. 706; 29 L. R. A. (N. S.) 937. (1909)

DUNN, J., delivered the opinion of the court:

A demurrer was sustained to a bill for partition filed in the circuit court of Macon county, the bill was dismissed for want of equity, and the complainants have appealed.

The complainants deraign title from Jonas Nye. He conveyed the premises by a statutory quitclaim deed "to Joseph Kretzer and Mora Kretzer, his wife, during their natural lives, and after their death to the heirs of said Joseph Kretzer." The Kretzers were afterwards divorced, and Mora Kretzer conveyed all interest in the premises to Joseph Kretzer, whose title by subsequent conveyances has become vested in the complainants. Joseph Kretzer has two sons, one of whom conveyed his interest in the premises to the other, who was made a party to the bill and filed the demurrer.

Appellants claim to be seised of the premises in fee simple. Whether they are so seised, depends upon the question whether the title conveyed by Jonas Nye to Joseph Kretzer was a fee or only a life estate. The language of the deed purports to convey the premises to the grantees during their joint lives, and, after their death, to

the heirs of Joseph Kretzer. Appellants claim that this deed is within the rule in Shelley's Case, and conveyed a fee to Joseph Kretzer, subject only to the life estate of Mora Kretzer as a tenant in common of the premises, and that, by the conveyance of her interest, the whole estate vested in Joseph Kretzer. No brief has been filed on behalf of the appellees. Under the rule in Shelley's Case, which is in force in this state, if an estate for life is granted by an instrument, and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. The rule is one of the most firmly established rules of property, and is unshaken in this state. In determining whether it is applicable in a given case, the question does not turn upon the quantity of estate intended to be given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise. *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Ward v. Butler*, 239 Ill. 462, 88 N. E. 189. When the heir takes in the character of heir, he must take in the quality of heir, and all heirs taking as heirs must take by descent. *Baker v. Scott*, 62 Ill. 86. The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the first taker. The language of the deed clearly indicates the nature of the estate intended to be given to the heirs of Joseph Kretzer. He is given an estate for life, with remainder in fee to his heirs, as a class without reference to individuals or any other condition. The estate thus given to the heirs by the operation of the rule vests in the life tenant.

The requisites of the rule are stated to be, first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate, by the name of heirs as a class, and without explanation, as meaning sons, children, etc.; third, the estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality,—that is, both legal or both equitable. *Baker v. Scott*, and *Ward v. Butler supra*. All these requisites are present here; viz., a life estate to Joseph Kretzer and a remainder in fee simple to his heirs,—both legal estates created by one deed. Two reasons suggest themselves which might be urged against the application of the rule: (1) The life estate is in one-half the property only, while the remainder is in the whole; (2) the life estate might be determined by the death of Mora Kretzer in the lifetime of Joseph, thus destroying the remainder by

determining the particular estate before the happening of the contingency which would determine the persons who would succeed to the remainder. Neither of these reasons, however, is a valid objection to the application of the rule. It is not a requisite that the estate given to the ancestor, and that to the heirs, shall be of the same quantity. *Ward v. Butler, supra*. The rule has no effect upon the estate given to the ancestor. It affects only the remainder given to the heirs, and causes such remainder to vest in the ancestor, and not in the heirs. If there is a merger in the ancestor, it follows, not as a necessary result of the operation of the rule, but from the operation of another independent rule of law in regard to separate estates which in any manner become vested in one person. In regard to the destruction of the supposed contingent remainder to the heirs of Joseph Kretzer, who cannot be known in his lifetime, by the termination of the particular estate before his death, the rule that contingent remainders are destroyed which do not vest at or before the termination of the particular estate has no application. There is no contingency, because the remainder which is expressed to be to the heirs of Joseph Kretzer the law declares to be a remainder to Joseph Kretzer, the same as if it had been made expressly to him and his heirs. Where there is a limitation to several for their lives, with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given. *Fuller v. Chamier*, L. R. 2 Eq. 682; *Bullard v. Goffe*, 20 Pick 252. The limitation to the heirs must be to the heirs of a person taking a particular estate of freehold; but, if it is confined to such heirs, then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not. *Watkins, Descendants*, 162-164; *Fearne, Contingent Remainders*, 4th ed., 23-30; 1 *Preston, Estates*, 313-320; *Rogers v. Downs*, 9 Mod. 292; *Merrill v. Rumsey*, 1 Keble, 688. *Fearne* states the rule as follows (page 25): "Whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail (either immediately, without the intervention of any mesne estate of freehold between his freehold and the subsequent limitation to

his heirs, or mediately, that is, with the interposition of some such mesne estate), there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor, and does not remain in contingency or abeyance, with this distinction: That, where such subsequent limitation is immediate, it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but, where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates."

The deed of Jonas Nye conveyed to Joseph Kretzer and Mora Kretzer an estate, as tenants in common, during their joint lives, with a remainder in fee to Joseph Kretzer. The conveyance of Mora Kretzer to Joseph Kretzer vested the latter with the whole title.

The court erred in sustaining the demurrer to the bill, and the decree will be reversed and the cause remanded to the Circuit Court, with directions to overrule the demurrer.

Note: There is an extensive note on the subject of the Rule in Shelley's Case in 29 L. R. A. (N. S.) 937.

JESSON v. WRIGHT.

2 *Bligh*, 1. (1820)

* * * The Law Chancellor (on moving the judgment) (Lord Eldon). The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the court, by their judgment, have decided "that the said William Wright took only a life estate under the said will of the said E. Persehouse, with remainder to his children for life; and that the recovery suffered by the said William Wright, and Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas, the said R. Jesson, J. Hatley, W. Whitehouse, J. Watton, E. Dangerfield the elder, and T. Dangerfield, allege for error, that the testator intended to embrace all the issue of the said William Wright, which intention can only be effected by giving to the said William Wright an estate tail, and the words of the will are fully sufficient for that purpose." I will

not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one, of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long that it would be to remove the landmarks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is definitely settled as a rule of law that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the court below has proceeded upon the notion, that no such paramount intent is to be found in this will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the plaintiffs in error, are to be found the words "appointee in tail general of the lands, &c., thereafter granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto William, one of the sons of my sister Ann Wright before marriage, all that messuage, &c., to hold the said premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair." If we stop here it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and after his decease, I give and devise all the said dwelling-houses &c., unto the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing." If we stop there, notwithstanding he had before

given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal. The will then proceeds, "in such shares and proportions as he, the said William, shall by deed, &c., appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the plaintiffs in error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, limitation, or appointment, then to the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar) that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs of the body," in this part of the will, must mean the same class of persons as the "heirs of the body," among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of ap-

pointment, the whole estate is given to one child, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child; he would have been heir of the body and his issue would have been heirs of the body; but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "for want of such issue", which follow, it is said, mean for want of children; because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words "share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue", they conclude must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words heirs of the body, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue,") there is an end of the question. I do not go through the cases. That of *Doe v. Goff* (11 East, 668) is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary; because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law than to provide against the hardships of particular cases.

Lord Redesdale. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be

able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson v. Colson* (2 Atk. 246) it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words "heirs of the body", in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe v. Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, it has been held that the words "tenants in common" do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways, which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties, but look to the words used in the will. The words, "for want of such issue", are far from being sufficient to overrule the words "heirs of the body". They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs

“of the body”, and in referring to those words they show another intent. The defendants in error interpret “heirs of the body” to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words “heirs of the body” to mean children in this will. I think it is necessary, before I conclude, to advert to the case of *Doe v. Goff*. It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe v. Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean—they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator’s conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe v. Goff* is not law.

In this case, even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children might as easily be defeated, because William might, by agreement with his heir, have destroyed their estates before they arose. Suppose he had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the proportions would have been changed, and afterborn children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.

DE VAUGHN v. HUTCHINSON.

165 U. S. 566; 17 Sup. Ct. 461; 41 L. Ed. 827. (1897)

Appeal from the Court of Appeals of the District of Columbia.

Samuel De Vaughn, a resident of the District of Columbia, died on the 5th day of July, 1867, leaving a last will and testament dated April 20, 1861. This will was admitted to probate September 1, 1867, and was, as to those of its provisions which are involved in the present litigation, as follows:

"I give and bequeath unto my sister Susan Brayfield all my personal property, of whatsoever description." * * * (After a devise to Susan Brayfield for life of the following real estate he adds:)

"I also desire that square four hundred and eighty-three shall be subdivided at the death of my sister Susan Brayfield, and distributed as follows: Mary Rebecca Brayfield shall have the whole front on K Street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same; Martha Ann Mitchell shall have ninety feet on Sixth Street, running that breadth through the square to Fifth Street; and Catherine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three,—during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns, forever." * * *

Martha Ann Mitchell, one of the devisees named in the will, died in the year 1866, before the death of the testator, Samuel De Vaughn, leaving, as her only children and heirs at law, Benjamin D. Mitchell, Richard R. Mitchell, and Sarah W. Hutchinson. Mrs. Susan Brayfield, the tenant for life, died in December, 1891.

In May, 1892, James H. De Vaughn, Emily De Vaughn, and Rebecca J. Kirk, as heirs at law of Samuel De Vaughn, brought, in the supreme court of the District of Columbia, a bill in equity against William H. De Vaughn and others, also heirs at law of Samuel De Vaughn. The purpose of the bill was to have a declaration that, by reason of the decease of Martha Ann Mitchell during the lifetime of the testator, the devise to her lapsed and became void, and that thereupon, upon the death of the testator and of Susan Brayfield, the real estate described in said devises became vested in the heirs at law of the said testator, as if the said testator had died intestate as to said real estate; and, upon such declaration, that the said real estate should be sold, and the proceeds of such sale should be dis-

tributed among the parties lawfully entitled thereto, as heirs at law of the said Samuel De Vaughn.

To this bill appeared Benjamin D. V. Mitchell and others, the children of the said Martha Ann Mitchell, who were living at the death of the said testator, and who filed a demurrer to said bill. Upon argument in the supreme court of the District of Columbia, the demurrer was sustained, and, the complainants electing to stand on their said bill, a final decree was entered, dismissing the bill, and awarding an account of rents and profits. * * *

MR. JUSTICE SHIRAS delivered the opinion of the court.

It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *U. S. v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat, 577; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Insurance Co.*, 96 U. S. 627.

Accordingly, in the present case, we are relieved from a consideration of the innumerable cases in which the courts in England and in the several states of this Union have dealt with the origin and application of the rule in *Shelley's Case*. We have only to do with that famous rule as expounded and applied by the courts of Maryland while the land in question formed part of the territory of that state, and to further inquire whether, since the cession of the lands forming the District of Columbia, there has been any change in the law by legislation of congress.

We learn from the reported cases that the rule, as established in the jurisprudence of England before the American Revolution, was introduced into Maryland as part of the common-law, and has been constantly recognized and enforced by the courts of that state. *Horne v. Lyeth*, 4 Har. & J. 431; *Ware v. Richardson*, 3 Md. 505; *Shreve v. Shreve*, 43 Md. 382; *Dickson v. Satterfield*, 53 Md. 317; *Holstead v. Hall*, 60 Md. 209.

But we also learn from those cases and other Maryland cases that might be cited that, though the rule is recognized as one of property, yet if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail.

Thus, in the case of *Shreve v. Shreve*, 43 Md. 382, where there was a devise to named children of the testator, for and during their natural lives, and on the death of said children, or either of them,

to his or her issue lawfully begotten, and their heirs or assigns, forever, it was held that the word "issue", used in the clause cited, was a word of purchase; and in the opinion it was said: "Again, there are words of limitation super-added to the gift to the issue; it is to them and their heirs forever. Now, in the well-known case of *Luddington v. Kime*, 1 Ld. Raym. 203, the devise was in very nearly the same terms, viz. to A. for life without impeachment of waste, and, in case he should leave any issue male, then to such issue male and his heirs, forever, with a limitation over in default of such issue; and the court held the testator intended the word "issue" should be *designatio personae*, and not a word of limitation 'because he added a further limitation to the issue, viz. and to the heirs of such issue forever.' The principle deduced from this case is thus stated in 6 Cruise, Dig. (3d Am. Ed.) p. 259: 'Where an estate is devised to a person for life, with remainder to his issue, with words of limitation added, the word "issue" will in that case be construed to be a word of purchase.' * * *

In *Clark v. Smith*, 49 Md. 117, the court, by Alvey, J., stated the rule as follows:

"It is a well-settled rule of construction that technical words of limitation used in a devise, such as 'heirs' generally, or 'heirs of the body,' shall be allowed their legal effect, unless, from subsequent inconsistent words, it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon, in *Wright v. Jesson*, 2 Bligh, 1, the words 'heirs of the body' will, indeed, yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but they must be clearly intelligible and unequivocal." * * *

Nor do we find that there has been any attempt by the courts of the District to lay down a different rule. What is the law of those courts we learn from the opinion of the court of appeals filed in this case, reported in 3 App. Cas. D. C. 50, where the doctrine was thus stated:

"It is certainly a well-settled principle in the law of real property, indeed as well settled as the rule in *Shelley's Case* itself, that where an estate is expressly devised to a person for life, with remainder to the heirs of his body, and there are words of explanation annexed to such word 'heirs', from whence it may be collected that the testator meant to qualify the meaning of the words 'heirs', and not to use it in a technical sense, but as descriptive of the person or persons

to whom he intended to give his estate, after the death of the first devisee, the word 'heirs' will in such case operate as word of purchase."

As this opinion was delivered by a judge who was but recently the chief justice of the court of appeals of Maryland, it may not be out of place to quote what he says respecting the law of that state:

"In the courts of Maryland, where the law of real property is supposed to be the same as that which prevails in this District, except as it may have been changed by positive legislation since the cession by that state, the same principle of construction has been fully recognized and applied in numerous cases. This will clearly appear upon examination of the cases of *Horne v. Lyeth*, 4 Har. & J. 435; *Chelton v. Henderson*, 9 Gill, 432; *Shreve v. Shreve*, 43 Md. 382; *Fallon v. Harman*, 44 Md. 263; and *Clark v. Smith*, 49 Md. 117."

The case of *Daniel v. Whartenby*, 17 Wall. 639, was cited by the court below, and is discussed in the briefs of the respective counsel. The syllabus of the case is as follows:

"A testator gave his estate, both real and personal, to his son, R. T. 'during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns, forever.' In case R. T. should die without lawful issue, then, in that case, he devised the estate to his own widow and two sisters 'during the natural life of each of them, and to the survivor of them,' and, after the death of all of them, to J. W., his heirs and assigns, forever, with some provisions in case of the death of J. W. during the lifetime of the widow and sisters. Held, that the rule in *Shelley's Case* did not apply, and that the estate in R. T., the first taker, was not a fee tail, but was an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and, in default of such issue, remainder for life to his widow and sisters, with remainder over in fee, after their death, to J. W."

This case came up on a writ of error to the circuit court of the United States for the district of Delaware, and it is noticeable that the reasoning of this court did not proceed upon the law as expounded by the courts of that state, but rather upon a general view of the English and American cases. Still, as the judgment of the circuit court was affirmed, we may well suppose that the conclusion reached in this court was in conformity with the law as applied in the State of Delaware.

The rule extracted from the cases was thus stated by Mr. Justice Swayne:

"In considering the rule in Shelley's Case with reference to the present case, a few cardinal principles, as well settled as the rule itself, must be kept in view. In construing wills, where the question of its application arises, the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no further. The meaning of this is that if the testator has used technical language, which brings the case within the rule, a declaration, however, positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase, and not by descent, will be unavailing to exclude the rule, and cannot affect the result. But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail."

And, after examining the language used, the conclusion was thus expressed:

"We entertain no doubt that the testator intended to give a life estate only to Richard, and a fee simple to his issue, and that they should be the springhead of a new and independent stream of descents. We find nothing in the law of the case which prevents our giving effect to that intent."

We agree with the court below that the reasoning of the case of Daniel v. Whartenby, if applicable to the present case, would sustain the construction put upon the will of Samuel De Vaughn by the supreme court of the District.

But, even if that case be regarded as declaratory only of the law of Delaware, its principles were followed and applied in the subsequent case of Green v. Green, 23 Wall, 486, involving the construction of a conveyance of lands situated in the District of Columbia, and where the cases of Daniel v. Whartenby, *supra*, and Ware v. Richardson, 3 Md. 505, were both approved.

We therefore think it clear that, under the law as declared in the courts of Maryland and of the District of Columbia, Martha Ann Mitchell took a life estate only, and that her children took an estate in fee.

In the view that we have taken of the case, we are not called upon to re-enforce the reasoning of the cases cited, but we shall add a single observation, in application of Chancellor Kent's statement of

an exception to the rule. 4 Kent, Comm. (6th Ed.) 221. The word "heirs", in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as "heirs". But the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body, and to their heirs and assigns,—a restricted class of heirs; and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession, and take as purchasers, and not as heirs.

The decree of the court below is affirmed.

GREEN v. GREEN.

23 Wall (U. S.) 486; 23 L. Ed. 75. (1874)

* * * MR. JUSTICE HUNT delivered the opinion of the court:

In Shelley's Case, the rule is thus laid down: "that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase."

Mr. Preston uses the following language, which is approved by Chancellor Kent: "When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

The trust deed of Thomas Green of January 15th, 1867, creates the following trusts, to which the premises are subjected:

1. To the use of Catharine Green and the children of Thomas Green and herself during the life of Catharine Green. There are two such children. Catharine and her two children are, therefore, joint tenants, or tenants in common of the estate during the life of Catharine. The words, "as if she were *feme sole*," "free and clear of any right or control of her present or future husband," do not define the estate, but have the effect simply to exclude any possible claim on the part of her husband or his creditors.

2. To such uses and purposes as the said Catharine may, by testamentary writing, limit and appoint.

3. In the absence of such limitation, or subject thereto or remainder after her death, to the heirs-at-law of the said Catharine.

It is contended that these trusts create an estate in fee simple in Catharine Green, which, by her deed to Mr. Ward, has become vested in him.

The rule in Shelley's Case is applicable to trust estates where both the life estate and the remainder are of the same character. The legal effect of the union of the estates, as declared by that rule, does not occur where the life estate is of an equitable character and the remainder is a legal estate, or vice versa. Both estates must be of the same character. The Court of Chancery does not, however, consider itself tied up to an implicit observance of the rule in respect to limitations which do not immediately vest the legal estate. * * *

KAY v. SCATES, *Supra*, p. 209.

HUGHES v. NICKLAS.

70 Md. 484; 14 Am. St. Rep. 377; 17 A. 398. (1889)

McSHERRY, J. The single question involved in this appeal is what estate did Jane Shaw take, under the will of George Ackerman, in certain leasehold property? It is insisted by the appellant that she took an absolute interest therein, while the appellee contends that she was entitled only to a life-estate, and that upon her decease the remainder passed to Christiana Snyder. The will of George Ackerman must determine this controversy. It bears date May 16, 1831, and was admitted to probate October 28, 1834. The only clauses which have any reference to the question before us are in the following words: "And to my adopted child, Jane Shaw, whom I have raised from infancy, and who now lives with me, I give and bequeath all my property, consisting of houses and vacant lots, situate on the west side of High street between York and Pitt streets, in the city of Baltimore, during her natural life, with remainder over to the heirs of her body, if she should have any, but, in

case she should die without such heirs, then the said remainder to my cousin, Christiana Snyder, widow as aforesaid, to her and her heirs forever. And I give all the residue of my property, of whatsoever name or nature, to the said Jane Shaw, without limitation or restriction," etc. It is conceded that the property referred to in the first of the two clauses quoted was leasehold property. Jane Shaw married William Campbell. She died in 1886 without ever having had issue. She left a last will and testament, whereby, after making small bequests to other persons, she gave the residuum of her estate to John W. Hughes, a grandson of her deceased husband, and she appointed him executor. He is the appellant in this case. Christiana Snyder also died, leaving a will by which she gave the residuum of her estate to her grandchildren. The appellee is administrator d. b. n. c. t. a. of her estate.

It has been argued that the intention of George Ackerman, apparent on the face of the will, was to give Jane Shaw merely a life-estate in the leasehold property, and that this intention must control the construction to be placed on the language used in making the bequest of that property to her. It is undoubtedly true that a testator's intention, when legally manifested, will be given effect to, unless it violates some fixed principle of law, or would, if gratified, break down some settled rule of property, or unless it be defeated by the use of technical words whose meaning, when they are found in wills, is inflexible and unvarying. For instance, no matter how clear may be the intention to create a perpetuity, it cannot be gratified, because forbidden by law, and even though the intention to give but a life-estate may be perfectly evident, yet if, in attempting to create it, words have been employed which have invariably been held to carry the fee, the fee, and not a mere life-estate, will pass. There is perhaps no rule of property more deeply rooted in the jurisprudence of this State than that which is known as the "rule in Shelley's Case." It is a rule of tenure which is not only independent of, but generally operates to subvert, the intention, and so firmly is it, with its qualifications, established here, that, as said by this court in *Shreve v. Shreve*, 43 Md. 394; "nothing but an act of the legislature can strike it out of our system of real law." The definition of the rule given by Mr. Preston (1 Prest. Est. 263), adopted with slight modifications by Chancellor Kent (4 Kent Com. 215), and quoted with approval in *Ware v. Richardson*, 3 Md. 544, is so familiar that it need not be repeated in this opinion.

If the subject of the gift to Jane Shaw had been real estate, she

would have taken, under the rule, an estate in fee-tail, which by the operation of our law of descents would have been converted into an estate in fee-simple, notwithstanding the most positive and unequivocal declaration that she should take only an estate for life. But it is supposed a different result must follow in this case because the gift relates to personal property. In support of this position, our attention has been called to the cases which hold that in respect to personal estate attention is paid to any circumstance that seems to afford ground for construing a limitation after dying without heirs or without issue to mean a dying without heirs or issue living at the death of the party, in order to support a bequest over, though as to real estate the construction is generally otherwise. *Walls v. Woodland*, 32 Md. 104; *Gable v. Ellender*, 53 Md. 311. But the principle which strikes down as void, because too remote, a limitation in remainder after an indefinite failure of issue, is not the one upon which the rule in *Shelley's Case* is founded, nor upon which the decision of the case before us depends. If the rule in *Shelley's Case* is applicable to leasehold estates as well as to a freehold, the case is entirely free from difficulty. In *Butterfield v. Butterfield*, 1 Ves. Sr. 154, the testator directed that £400 should be put out on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body, and if it should so happen that he should die without heirs of his body, it should go to his youngest son B., Lord Hardwicke held that the son T. should take the whole absolute interest. In *Garth v. Baldwin*, 2 Ves. Sr. 646, personal property was limited to trustees to pay the profits to Edward Turner Garth for life, and afterwards to pay the same to the heirs of his body. The lord chancellor held that the case was reduced to this: a gift of personal estate to one for life, and the heirs of his body: that must vest the property in him, whether the testator intended it or not. In *Atkinson v. Hutchinson*, 3 P. Wms. 259, the Lord chancellor stated that if a term of years be limited to A. for life, remainder to the heirs of his body, A. would take the whole interest. In *Elton v. Eason*, 19 Ves. Jr. 78, the master of the rolls said: "It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate-tail in land gives the whole interest in personal property, which is incapable of being entailed." And in *Horne v. Lyeth*, 4 Har. & J. 431, which, though not a decision by the court of appeals, has been followed and approved in many cases by this court, it was distinctly determined "that if a leasehold estate is

limited to one for life, the remainder to the heirs of his body, the whole interest vests in the first taker and that the words, "for life" will not be sufficient to restrict his interest to a life-estate." This was recognized in *Warner v. Spriggs*, 62 Md. 14.

It would seem, then, to be perfectly clear that the bequest to Jane Shaw is, by analogy at least, directly within the rule. The gift is of a leasehold interest to Jane Shaw during her natural life, with remainder over to the heirs of her body, if she should have any, as a class of persons to take in succession from generation to generation. The limitation to the heirs entitled her to the absolute interest, which was not restricted by the words "if she should have any" heirs. The second clause quoted from the will cannot affect this conclusion. It is claimed its provisions plainly indicate that the testator intended to give Jane Shaw only a life-estate under the first clause; but, even if this should be conceded, the result would not be changed, because no matter how evident the intention to create but a life estate may be, when the words actually used bring the gift within the rule the intention must give way, and the fixed rule must be followed. Accordingly, Hughes, who claims under the will of Jane Shaw, is entitled to the estate, and the funds brought into court, being the rent due by the lessee of the term, are payable to the appellant. There was error, therefore, in the decree below, which denied the appellant's right to these funds, and it must be reversed. The cause will be remanded, that a decree may be passed in conformity with this opinion.

HAYWARD v. HOWE, *Supra*, p. 72.

CHAPTER XI.

EXECUTORY INTERESTS.

- Section 1. Springing Uses.
- Section 2. Shifting Uses.
- Section 3. Executory Devises.
- Section 4. Failure of Executory Limitations.

SEC. 1. SPRINGING USES.

SIR EDWARD CLERE'S CASE.

6 Coke, 17b. (1599)

In an assize by Parker against Sir Edward Clere, Knight of lands in the county of Norfolk, the case in effect was such. Clement Harwood seised of three acres of land, each of equal value held *in capite*, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing, and afterwards by his last will in writing he devised the said third acre to one in fee (under whom the plaintiff claimed). And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole, was the question. And in those cases four points were resolved by Popham, Chief Justice, and Baron Clark, Justices of Assize of the said county, upon conference had with the other Justices: 1. If a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. Vide Lit. fol. 109a. When a man makes a feoffment to the use of his last will, he has the use in the mean time. 2. If in such case the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the

will; so that in such case the will is but declaratory: but, if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case the land being held *in capite*, the devise is good for two parts, and void for the third part. For as the owner of the land he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part: for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held *in capite*. 3. If a man makes a feoffment in fee of lands held *in capite*, to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for a third part; for a feoffment to the use of his will, and to the use of him and his heirs is all one. 4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he could not as owner of the land devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land, and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case, at bar, having, as owner of the land, conveyed two parts to the use of his wife *ut supra*) he could not make any devise (thereof) therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void; and judgment was given accordingly for the plaintiff for the whole land so devised. And afterwards on the said judgment Sir Edward Clere brought a writ of error in the King's Bench, *sed non praevaluit*, but the judgment was affirmed.

WALLIS v. WALLIS.

4 Mass. 135; 3 Am. Dec. 210. (1808)

Assumpsit. The action was originally brought by plaintiff's testator, and on his decease prosecuted by plaintiff. The case was submitted to this court upon the following statement of facts: On the eleventh of June, 1805, defendant by his deed conveyed to the plaintiff's testator, defendant's son, his heirs and assigns, a certain tract of land, to have and to hold after the death of the grantor, the consideration of four hundred dollars being expressed in the deed. The grantor entered into covenants of seisin and against incumbrances, except his, the grantor's right to the use and improvement of the land during his life, and also of warranty. The defendant refused to permit the testator to enter under the said deed; and this action was brought to recover the four hundred dollars consideration money, on the ground that nothing passed by the deed.

PARSONS, C. J. We do not know any legal principles on which this action can be supported. The money was not paid through mistake, being supposed to be due when it was not; it was not obtained by deceit, fraud, imposition or oppression; nor was it paid upon an executory contract, which has happened to fail, or which has been or might be lawfully disaffirmed by either party. The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey a freehold *in futuro*; but he voluntarily paid the money for such a conveyance, and took a covenant from the grantor that, after his death, the grantee and his heirs should have the land; which covenant, at the grantor's death, may be broken, and the foundation of an action for damages, if a title to the land be not made to the grantee or his heirs.

But fortunately for the grantee, he is mistaken in the construction of his deed. For, although it is true that by a common law conveyance a freehold cannot be conveyed *in futuro*, yet by a covenant to stand seised to uses, such conveyance can be effected. And every deed ought to be construed, if it be legally possible, so as to effect the intent of the parties. In this case, beside the valuable consideration expressed, a consideration of natural affection may be averred as consistent with it, for the consanguinity of the parties, though not mentioned in the deed, is agreed in the case. The intent of the parties is clear, and there is a covenant of the grantor, that after his death the grantee shall have the land. This conveyance is therefore

to be considered, in law, as a covenant by the grantor to stand seised of the land, to his own use during his life, and after his decease to the use of the grantee and his heirs. And upon the execution of the deed the grantor was tenant for life, and a remainder in fee was vested in the grantee.

The plaintiff must be called.

Note: In *Dozier v. Toalson*, 180 Mo. 546; 79 S. W. 420; 103 Am. St. Rep. 586, it was held that a deed from a mother to her daughter by general warranty, excepting and reserving the uses, rents and profits during the grantor's lifetime conveys to the grantee a vested remainder in fee subject to a precedent life estate in the grantor, by way of reservation.

SEC. 2. SHIFTING USES.

MUTTON'S CASE.

Dyer's Reports 274b. (1568)

John Mutton, seised of certain land in his demesne as of fee, levied a fine thereof to certain persons, and to the heirs of one of them; and the use and intent of this fine is declared by certain indentures to be to the use of the said J. M. and of such wife **and** wives as the said J. M. should happen afterwards to marry by **whatever** names she or they might be called, for and during their **natural** lives and the life of the survivor of them, with divers remainders over. And afterwards the said J. M. took to wife one A. **and** then died. Whether she shall take anything by the said indentures and fine, or not, *quaere*. And by the opinion of Wray and Mead, Serjeants, and Plowden, and Onslowe Solicitor, she may, and thereto they subscribed their names. The Statute of Uses 27 H. 8 (c. 10.) is, that where any person shall be seised to the use, confidence, or trust of any other, the same *cestuy a que* use, confidence, or trust, shall be seised and possessed to all intents, constructions, and purposes of and in

such like estate as he had in use, Etc. and the estate, title and possession of the person seised to the use, Etc. deemed in the *cestuy a que* use, Etc. after such quality, manner, form, and condition, as he had in the use, confidence, or trust, Etc. *Quære*. In whom the use shall be until the marriage, and what estate shall be in use. And, Whether the name of wife, without any other name, suffices for capacity to take a jointure with the husband, or by way of remainder after his decease, and what relation that shall have, scil. to the time of the feoffment or of the marriage, see 12 H. 7. fol. 27, in Trespass, Feoffment to the Use of the Parishioners of D. not incorporated. Also in the time of Ed. I. feoffment to a man, and to that person who shall be his first wife, is not a good jointure. And 18 E. 3 (59 b. pl. 91) Intrusion. A demise to a man, *habendum* to him and the first son of his begetting, is not good joint-tenancy, nor by way of remainder, Etc. because they were not *in rerum natura* at the time of the feoffment. Also afterwards 5 E. 4 fol. 4 (7b. pl. 17) the brother's possession of an use makes the sister heir. The case above was argued Michaelmas 13 & 14 of the present Queen by Geffray and Meade. See a like case H. 17 (fol. 339b. pl. 48) *postea*.

SEC. 3. EXECUTORY DEVISES.

BEARD AND OTHERS v. ROWAN.

9 Pet. 314; 9 L. Ed. 367. (1835)

MR. JUSTICE THOMPSON delivered the opinion of the court:

* * * The clause in the will of John Campbell, upon which the right to the land in question depends, is as follows:

"And if within that time, my said half-brother, Allen Campbell, shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivor or survivors of them, shall convey to him, my said half-brother, Allen Campbell, his heirs or assigns, in fee simple, all the lands herein before described in this devise. But if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said lands, hereby directed to be conveyed to him, on two years' credit; with

interest from the date, to be paid annually. And the money and interest arising from such sale, to be transmitted to my said half-brother, to whom I give and bequeath the same."

The testator then provides for the disposition of these lands, and the proceeds thereof, in case his said half-brother shall die before the expiration of the aforesaid term of five years after his arrival at the age of twenty-one years; and then adds the following clause:

"But should my said half-brother become a citizen of the United States of America, or be otherwise qualified to hold real estate within the same, before his death; it is then my will and desire, that he shall have the sole absolute disposal of all the estate herein before devised and bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees."

It is contended on the part of the demandants, that under this will, the legal estate of the land, in question is vested in the executors and trustees; and that Allen Campbell did not take any legal estate under the will, and could not acquire it, except by deed from the trustees or the survivor of them. And they contend that Richard Taylor was such survivor; and they claim under the deed from him of the 21st of April, 1826. But if Richard Taylor had no authority to convey this land, the demandants fail entirely to show any title whatever in the land. His authority to convey the land, lies at the foundation of the right set up by them.

Richard Taylor is not named as one of the trustees. The trustees named are, James Milligan, Charles Simms, William Elliott, and Philip Ross; who are also appointed executors; and to whom the testator devises his estate, both real and personal, in trust for the uses and purposes provided and declared in his will. It is true that he afterwards, in a codicil, names Richard Taylor as one of his executors. But the estate was vested in the other executors named, as trustees; and Taylor, in his capacity merely as executor, acquired no title to the land, or any authority to sell it.

But it is unnecessary to rest the case upon this point, as it is very clear that, under the will of John Campbell, his half-brother, Allen Campbell, took an estate in fee simple, as an executory devise, without any deed from the trustees.

The intention of the testator in this respect cannot be mistaken. Allen Campbell was then an alien, and was not or might not be qualified to take and hold real estate. The title was accordingly vested in trustees, with directions to convey the same to him, when he should become qualified by law to take and hold the same. And if

he should not, within a specified time, become qualified to take and hold real estate, his trustees are directed to sell the land, and transmit the avails thereof to the said Allen Campbell; thus providing for all supposed contingencies with respect to the situation of the devisee, and to enable him to receive the benefit of the devise. But that his right and title to this estate might not at all depend upon the trustees, he devises the land directly to the said Allen Campbell, if he should at any time before his death become a citizen of the United States, or be otherwise qualified to hold real estate; notwithstanding he may not have obtained deed therefor from his said trustees.

This was a good executory devise, depending on the contingency of his becoming a citizen of the United States or otherwise qualified to hold real estate. The contingency was not too remote. It must necessarily, not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever. And upon the happening of this contingency, there can be no doubt but the devisee took an estate in fee. The words in the will are amply sufficient to pass an estate in fee. And the only remaining inquiry is, whether Allen Campbell, before his death, became qualified to take and hold real estate, in the State of Kentucky. And this will depend upon the act of the legislature of that state, passed on the 18th of December, 1800, which is as follows: "whereas, by the laws now in force in this commonwealth, aliens cannot hold lands therein, and whereas, it is considered the true interest of this state, that such prohibitions be done away: Be it therefore enacted, &c., that any alien, other than alien enemies, who shall have actually resided within this commonwealth two years, shall, during the continuance of his residence herein, after the said period, be enabled to hold, receive, and pass any right, title, or interest, to any lands or other estate known, within this commonwealth, in the same manner, and under the same regulations, as the citizens of this state may lawfully do." 2 Littell's Laws, 400.

The evidence in the record shows, and it is so found by the jury, that Allen Campbell came to the State of Kentucky, in December, 1799, and continued to reside therein until September, 1804, when he died intestate, never having been married. It is argued on the part of the demandants, that this law only embraces aliens who shall have resided within the state two years before the passing of the act; and does not, therefore, reach the case of Allen Campbell.

This is certainly too narrow an interpretation of this law, to meet

the obvious intention of the legislature; even admitting that such is the strict grammatical construction. * * *

BURLEIGH v. CLOUGH.

52 N. H. 267; 13 Am. Rep. 23. (1872)

FOSTER, J. * * * This distinction between property and power being kept within view, it becomes unnecessary to controvert the proposition, supported, doubtless, by the authorities so abundantly collected by the learned counsel for the appellants, and so explicitly declared by Chancellor Kent in *Jackson v. Robins*, 16 Johns. 589, that "it is a clear and well-settled rule of law, that an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance; that where conditions are repugnant to the estate to which they are annexed they are void (2 Redf. Wills, 659); that a valid executory devise cannot subsist under an absolute power of disposition in the first taker (4 Kent's Com. 270); from all which the appellants argue that the limitation over to Dennis, being by way of executory devise, is void;—for we are led to the inevitable conclusion that the estate limited to Dennis was not an executory devise, but a vested remainder; and the reasons which apply to the destruction of an executory devise by joining it to a power of disposal, have no application to a remainder, limited upon an estate for life.

We cannot so well express the definition and character of an executory devise as by adopting the language of the learned counsel for the appellee, in argument: "an executory devise is a future interest, such as the rules of law do not permit to be created in conveyances, but allow in the case of wills, like an interest given after an estate in fee simple, or to arise *in futuro*, without a particular estate to support it. *Scatterwood v. Edge*, 1 Salk. 229. They came into use after the Statute of Wills, 32 Hen. 8, and were allowed out of indulgence to testators, that they might, without the intervention of trustees to preserve remainders, establish future interests in strict settlement beyond the reach of those who had the prior estates.—4 Kent, 260; and such being the object, it was held to be essential to a good executory devise that the first takers should have no power to dispose of the interest devised. If, therefore, the first taker had

the power by grant from the testator to dispose of the executory devise, the power defeated the whole object of such devises, and was held to make them inoperative though the power was not executed. Every good executory devise, as the rule would seem to be established in England, is 'inalienable, though all mankind join in the conveyance.' *Scatterwood v. Edge*, 1 Salk. 229; 4 Kent, 260; 6 Cruise's D. 461, 465. For this reason, a power of disposition has been held to be inconsistent with the nature of such an interest. It is against this rule, even in the case of an executory devise, that Parker, C. J., objects, in *Eaton v. Straw*, 18 N. H. 320."

The distinction between an executory devise and a vested remainder is elementary. An executory devise is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. It needs no particular estate to support it. An estate in remainder is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole. See *Jackson v. Robins*, 16 Johns. 537, 588; *Downing v. Wherrin*, 19 N. H. 9, 85.

Another elementary principle applies in cases where it may be doubtful whether an estate is an executory devise or a remainder, namely: that a gift shall not be deemed an executory devise if it can take effect as a remainder; and that no remainder shall be considered contingent, if it may, consistently with intention, be deemed vested. *Blanchard v. Blanchard*, 1 Allen, 225; *Doe v. Perryn*, 3 Term, 484-489, note; 4 Kent's Com. 202; and see *Banister v. Henderson*, Quincy, Ms. 120.

By the terms of the will, Mrs. Hersey took two things—an estate for life, and a power of disposal of the estate; and it is contended that the grant of this power enlarges the estate for life to an estate in fee—that the power becomes merged in the estate.

Now, as an estate in fee, involving the right of disposal, cannot be reduced to an estate for life, by implication, from the addition of words conferring a power of disposal, so a separate and distinct grant of a power of disposal, although it may divest the estate in remainder, cannot enlarge an estate for life, expressly declared and limited, to a fee, because the power of disposition is not inconsistent with nor repugnant to an estate for life, as we shall presently see. It is not repugnant, because, if no power of disposal had been conferred by the will, she would have still taken an estate for life,

as she now takes both an estate for life and an added power of disposal. * * *

(Note: The court held that Mrs. Hersey took by her husband's will a life estate with a power of disposal and a vested remainder was limited after her life estate.)

BRITTON v. THORNTON.

112 U. S. 526; 5 Sup. Ct. 293; 28 L. Ed. 816. (1884)

GRAY, J. The question which lies at the foundation of this case is what estate Eliza Ann Thornton took in the land which Joseph Thornton specifically devised to her, "provided that, should the said Eliza Ann die in her minority, and without lawful issue then living, the lands hereby devised shall revert and become part of the residue of my estate hereinafter disposed of." By this specific devise, Eliza Ann Thornton took an estate in fee, defeasible by an executory devise over. That the estate devised to her, though without words of inheritance, was not an estate for life merely, but was an estate in fee, is not disputed, and is apparent from the description of the subject of the devise as "that plantation bought of Andrew Porter and John Davis;" from the charge, imposed upon her personally, to pay an annuity out of the rents; and from the devise over in the contingency of her dying under age and without issue then living, thereby implying that her estate would not be terminated by her death after coming of age or leaving issue; as well as from the provision of the statute of Pennsylvania of April 8, 1833, that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate." 2 Jarm. Wills, (5th Amer. Ed.) 270, 271, 276, and note; *Purd. Dig.* (10th Ed.) 1475, § 10.

It is equally clear that, upon her death under age, and without issue then living, her estate in fee was defeated by the executory devise over. When, indeed, a devise is made to one person in fee, and, "in case of his death," to another in fee, the absurdity of speaking of the one event which is sure to occur to all living, as uncertain and contingent, has led the courts to interpret the devise over as referring

only to death in the testator's life-time. 2 Jarm. Wills. c. 48; Briggs v. Shaw, 9 Allen, 516; Lord Cairns in O'Mahoney v. Burdett, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. O'Mahoney v. Burdett, above cited; 2 Jarm. Wills, c. 49.

We find nothing in this will to take the case out of the general rule, or to support the argument of the plaintiff in error that the testator intended that the devise over should not take effect if Eliza Ann survived him, or, at least, if she survived his son William. The phrase in the specific devise that, in the prescribed contingency, the land shall "revert and become part of the residue," is quite as consistent with the happening of the contingency after the estate has once vested in the devisee, as with its happening in the testator's life-time and before any estate has vested in her. The direction in the residuary clause that the residue shall be divided among all the testator's grandchildren when the oldest living grandchild shall attain the age of 21 years, or at the death of the testator's son William, whichever shall first occur, does not necessarily require a single and final division of the whole residue upon the death of William or the coming of age of a grandchild; for either of those events might happen before the termination of the widow's estate for life in that part of the property, real and personal, which, upon her death, must fall into the residue; and the coming of age of a grandchild might happen during the life of William, to whom also the testator had devised a life-estate in other land. * * *

HOWARD v. CARUSI and others.

199 U. S. 725; 3 Sup. Ct. 575; 27 L. Ed. 1089. (1884)

The pleadings and evidence in this case disclose the following facts: On March 18, 1872, Lewis Carusi, a bachelor about 78 years of age, and a citizen of the city of Washington, in the District of Columbia, being seized in fee of certain real estate in said city, executed his last will and testament. In the first item of the will he directed his just debts and funeral expenses to be paid out of his personal estate. The second item of the will was as follows:

"And as to all my property, real, personal, and mixed, after the payment of my just debts and funeral charges as aforesaid and the payment of the legacies hereinafter mentioned, I give, devise, and bequeath the same to my brother Samuel Carusi, to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces, Phillippa Estelle Caulfield, *nee* Carusi, Genevieve E. Carusi, and Isolina E. Carusi, the daughters of my said brother Samuel Carusi, as follows: To the said Phillippa Estelle Caulfield, *nee* Carusi, the sum of five thousand dollars, (\$5,000,) the remainder of my estate to be divided between Genevieve E. Carusi and Isolina E. Carusi, to share and share alike as tenants in common and not as joint tenants, and so that they, and they alone, shall have the right to have, possess, use, and enjoy the same separate and apart from and independent of any husband either one of them may have at the time of my decease or at any time thereafter, and so that he or they shall have no right, privilege, or power to control or interfere with any part of my said estate in any manner whatsoever, and so that the same shall not be subject or liable to any debt that any such husband may have incurred.

"I further hope, trust, and desire that in the event either one of my said nieces, daughters of the said Samuel Carusi, shall not survive my said brother Samuel, that the share she might become entitled to had she survived him may be conferred and fall to the surviving niece or nieces. In no event shall any portion of my estate be subject to the control or interference of any husband either one of my said

nieces may have at the time of my decease or at any time hereafter.

"I give and devise to my three nieces, daughters of my brother Nathaniel Carusi, the sum of two thousand dollars, (\$2,000.)"

By the third and last item of the will the testator appointed his brother Samuel Carusi the sole executor thereof.

Afterwards, on July 18, 1872, the said Lewis Carusi, as party of the first part, executed a deed of that date, which purported to convey to his brother Samuel Carusi party of the second part, in fee-simple, all his real estate in the city of Washington, upon trusts which were thus expressed:

"In trust, nevertheless, to, for, and upon the following uses and trusts, that is to say, in trust to sell and convey the whole or any part of the said pieces or parcels of ground and premises, at the discretion of the said party of the second part, and to invest the moneys arising out of such sale or sales in other property or securities, for the use and benefit of the said party of the first part; and in event of the death of the said party of the first part, so much of said pieces or parcels of ground as may remain unsold, or such other property as may be purchased, or such securities as may be acquired, in manner aforesaid, to convey to such person or persons as the said party of the first part, may, by his last will and testament, or other paper writing, under his hand and seal, by two persons witnessed, designate and direct."

The appellant averred, and the defendants denied, that this deed had been delivered by the grantor to the grantee therein named. Subsequently, on October 17, 1872, Lewis Carusi executed and delivered to his brother Samuel Carusi another deed, conveying to him absolutely in fee-simple the same lands described in said will and in the deed of July 18, reserving to himself the rents and profits thereof during his life. On October 25, 1872, Lewis Carusi died, having made no will other than that of March 18, 1872, above mentioned. After the death of Lewis, Samuel Carusi took possession of the real estate described in said will and deeds, claiming an absolute title in fee-simple thereto, by virtue of said will and the deed of October 17, 1872, and continued in possession until his death. On March 23, 1877, he duly executed his last will and testament, by which he devised to his wife, Adelaide S. Carusi, for her natural life, all his real estate, with remainder in fee at her death to his children, John McLean Carusi, Samuel P. Carusi, Thornton Carusi, Estelle Caulfield, Geneveve Carusi, and Isolina E. Howard, share and share alike, and appointed his wife, the said Adelaide S., and his son, the said John

McLean Carusi, the executors thereof. Afterwards, on December 22, 1877, Samuel Carusi died, and on January 8, 1878, his will was admitted to probate and record in the orphans' court of the District of Columbia.

The bill in this case was filed by Isolina E. Howard, one of the children and heirs at law of Samuel Carusi, against the defendants, who were her brothers and sisters and devisees under their said father's will. * * *

Separate answers were filed to the bill by each of the defendants, to which the complainant filed replications. Upon final hearing on the pleadings and evidence, in special term, the supreme court of the District of Columbia dismissed the bill. Upon appeal to the general term the decree of dismissal was affirmed. From the decree of affirmation the present appeal is taken.

WOODS, J. The case made by the bill of complaint is based on the will of Samuel Carusi and upon the deed of trust alleged to have been executed and delivered July 18, 1872. The contention of complainant is that, by the deed, Lewis Carusi conveyed to Samuel Carusi all his real estate in trust to convey the same to such person or persons as the said Lewis Carusi might, "by his last will and testament, or other paper writing under his hand and seal, by two persons witnessed, designate and direct;" and that, although the will was revoked by the trust deed, it was nevertheless effectual as a designation of the persons to whom said real estate was to be conveyed by Samuel Carusi, the trustee; and that the complainant and her sister, Genevieve Carusi, were the persons who were so designated by the will. It is clear, therefore, that complainant's case can derive no aid from the declarations of the testator, Lewis Carusi, alleged to have been made before and after the execution of his will, in relation to the disposition which he intended to make of his property. It must stand or fall upon the designation made in the will. It is clear, also, that the will is to receive precisely the same construction, as an instrument designating the beneficiaries of the trust deed, as it would have received as a last will duly proven and recorded. The question is, therefore, what estate did the testator intend to give the complainant by his will of March 18, 1872? This will gives—*First*, an estate in fee-simple to Samuel Carusi; it contains, *second*, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, *third*, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee-simple, with an abso-

lute power of disposition either by sale or devise, clearly and unmistakably implied. Therefore, according to the adjudged cases, the limitation over to the nieces of the testator is void. The rule is well established that, although generally an estate may be devised to one in fee-simple or fee-tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.

Thus, in the case of *Atty. Gen. v. Hall*, Fitz G. 314, there was a devise of real and personal estate to the testator's son and to the heirs of his body, and that if he should die leaving no heirs of his body, then so much of the real and personal estate as he should be possessed of at his death was devised over to the complainants in trust. The son in his life-time suffered a common recovery of the real estate, and made a will as to the personal estate, and died without issue, and a bill was filed against his executor to account. It was held by Lord Chancellor KING, aided by the master of the rolls and the chief baron of the exchequer, that the devisee was tenant in tail of the real estate, and had barred the plaintiffs by the common recovery, and that the executrix was not to account for the personal estate to the persons claiming under the limitation, for that was void as repugnant to the absolute ownership and power of disposal given by the will.

In the case of *Ross v. Ross*, 1 Jacob & W. 154, a limitation over was declared void because it was limited upon the contingency that the first taker did not dispose of the property by will or otherwise. See, also, *Cuthbert v. Purrier*, Jacob, 415; *Bourn v. Gibbs*, 1 Russ. & M. 615; *Holmes v. Godson*, 8 DeGex, M. & G. 152.

The American cases are to the same effect. Thus, in *Jackson v. Bull*, 10 Johns, 19, Charles Bull died seized of the premises in question. By his last will, after devising a certain lot of land to his son Moses, he declared: "In case my son Moses should die without lawful issue, the said property he died possessed of I will to my son Young, his lawful issue," etc. It was held that the limitation over was void, as being repugnant to the absolute control over the estate which the testator intended to give.

In *Ide v. Ide*, 5 Mass. 500, the devise was to the testator's son Peleg, his heirs and assigns, with the following provision: "And further, it is my will that if my son Peleg shall die and leave no lawful heirs, what estate he shall leave to be equally divided between my son John Ide and my grandson Nathaniel Ide, to them and their heirs

forever." Held, that his limitation over to John and Nathaniel Ide were void because inconsistent with the absolute, unqualified interest in the first devisee.

To the same effect is the case of *Bowen v. Dean*, 110 Mass. 432, where a man devised all his estate, real and personal, to his wife, "to hold to her and her assigns," but should she "die intestate and seized of any portion of said estate at the time of her death," then over. The wife took possession of the land and died, having made a will, by which she devised and bequeathed all her estate, real and personal. It was held that the will of the husband gave the wife, by necessary implication, an absolute power of disposal, either by deed or will, and this power having been fully executed by her will, nothing remained upon which the devise over in the will of her husband could operate.

In *Melson v. Cooper*, 4 Leigh, 408, the case was this: John Cooper died in 1813 seized of the messuage and land in controversy, having, by his last will duly executed, devised, *inter alia*, as follows: "I give to my son William Cooper the plantation I live on, to him and his heirs forever. In case he should die without a son and not sell the land, I give the land to my son George," etc. The plantation on which the testator lived was the land in controversy. George Cooper, the lessee of the plaintiff, was the testator's son George mentioned in the devise, who claimed the land under the limitation over to him therein contained. The testator's son, William, to whom the land was devised in the first instance, attained to full age, married, and died, leaving issue one daughter, but without leaving or ever having had a son, and without having sold the land. The question referred to the court was whether, upon this state of facts, George Cooper was entitled to the land. The court held that a general, absolute, unlimited power to sell the land was given to William Cooper by the devise, that he took a fee-simple, and that George Cooper was not entitled to recover. See, also, *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, Id. 468; *Ramsdell v. Ramsdell*, 21 Me. 288.

The rule is thus stated by Chancellor KENT:

"If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A., in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same; in all such cases the remainder over is void as a remainder because of the preceding fee; and it is void by way of executory devise, because the limitation is in-

consistent with the absolute estate or power of disposition expressly given, or necessarily implied, by the will." 4 Kent, Comm. 270.

If the will of Lewis Carusi had remained unrevoked and had been duly proven and recorded, and Samuel Carusi had died intestate, with all the property devised to him by Lewis Carusi undisposed of, the complainant would be entitled to no relief, for she would have taken nothing by the will. If the will can be held to designate any beneficiary under the trust deed of July 18, 1872, it designated Samuel Carusi, and not the complainant and her sisters. But by the terms of Lewis Carusi's will, the complainant and her sisters were only entitled to so much of the estate of Lewis as Samuel should "not have disposed of by devise or sale." The bill of complaint charges that Samuel Carusi, by his last will and testament, had devised to certain persons therein named, among them the complainant, all the property devised to him by the last will of Lewis Carusi. There was therefore no property of the estate of Lewis Carusi to which the supposed devise to complainant and her sisters could apply.

The case of complainant receives no support from the precatory words of the will of Lewis Carusi. These words express "the hope and trust that Samuel Carusi will not diminish the same (viz., the property devised to him by the will) to a greater extent than may answer for his comfortable support," and the testator then devises to complainant and her sisters what Samuel shall not have disposed of by devise or sale. The words do not raise any trust in Samuel. He is not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed upon him. . But even if the will had contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives Samuel Carusi the absolute power of disposal.

In *Knight v. Knight*, 3 Beav. 148, it was said by the master of the rolls (Lord LANGDALE:)

"If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request, * * * it has been held that no trust was created."

And see *S. C. nom. Knight v. Boughton*, 11 Clark & F. 513.

The rule is thus stated by Mr. Justice STORY in his Commentaries on Equity Jurisprudence, § 1070:

"Whenever the objects of the, supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, whenever the prior dispositions of the property import absolute and uncontrollable ownership, in all such cases courts of equity will not create a trust from words of this character."

See, also, *Wood v. Cox*, 2 Mylne & C. 684; *Wright v. Atkins*, Turn. & R. 143; *Stead v. Mellor*, 5 Ch. Div. 225; *Lambe v. Eames*, L. R. 10 Eq. 267; S. C. L. R. 6 Ch. 597; *Hess v. Singler*, 114 Mass. 56; *Pennocks' Estate*, 20 Pa. St. 268; *Van Duyne v. Van Duyne*, 1 McCart. 397; 2 Pom. Eq. Jur. §§ 1014, 1015, 1016, 1017, and notes.

The views we have expressed render it unnecessary to consider other questions argued by counsel. It is quite immaterial whether or not Lewis Carusi had mental capacity to execute the deed of October 17, 1872, or whether he had any title to the property described therein. If that deed had never been executed the fact would not aid the complainant's casè.

The result is that the decree of the supreme court of the District of Columbia, in general term, by which the decree of the special term dismissing the complainant's bill was affirmed, was right, and must itself be affirmed.

Note: *Tiffany* (page 331) holds that the doctrine of this case seems on principle difficult to justify.

Minor & Wurtz says:

"In holding the ulterior limitation thus void for repugnancy the courts proceed upon the theory that a true conditional limitation from its very nature must hamper and trammel the first taker's power of alienation, and if that power is expressly given to the first taker, unhampered and untrammelled, in order to carry it into effect, the subsequent limitation must be declared void. The two intentions of the grantor or testator are inconsistent and self contradictory and one or the other must give way."

SEC. 4. FAILURE OF EXECUTORY LIMITATIONS.

BRATTLE SQUARE CHURCH v. GRANT, *infra*, p. 413.

FIRST UNIVERSALIST SOCIETY v. BOLAND.

155 Mass. 171, 15 L. R. A. 231; 29 N. E. 524. (1892)

Joseph D. Clark, for a consideration of \$900.00 conveyed land to the plaintiff Society, "to have and to hold to the said First Universalist Society so long as said real estate, shall be by said Society or its assigns, devoted to the uses, interest and support of those doctrines of the christian religion embraced in the confession of faith adopted by the general convention of universalists held, etc." The land was used for religious purposes until 1891, when it was sold to the defendant. The defendant refused to accept the deed tendered him upon the ground that the plaintiff could not convey a title in fee simple. Suit for a specific performance was brought by the plaintiff.

ALLEN, J. The limitation over, which is contained in the deed of Clark to the plaintiff in 1854, is void for remoteness. *Wells v. Heath*, 10 Gray, 17; *Brattle Square Church v. Grant*, 3 Gray, 142. The fact that the grantor designated himself as one of the persons amongst many others to take under this limitation, does not have the effect to make the limitation valid. He was to take with the rest and stand upon the same footing with them.

Where there is an invalid limitation over, the general rule is that the preceding estate is to stand unaffected by the void limitation. The estate becomes vested in the first taker according to the terms in which it was granted or devised. *Brattle Square Church v. Grant*, 3 Gray, 142. *Sears v. Russell*, 8 Gray, 86; *Fosdick v. Fosdick*, 6 Allen 41, *Lovering v. Worthington*, 106 Mass. 86; *Lewis on Perpetuity*, 657. There may be instances in which a void limitation might be referred to for the purpose of giving a construction to the language used in making the prior gift, provided any aid could be gained thereby. In the present case we do not see that any such aid can be gained. The estate given to the first taker does not depend at all upon the validity or invalidity of the limitation over, and the construction of the language used is not aided by a reference thereto.

The grant to the plaintiff, was to have and to hold, etc., "so long

as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as Walsingham's Case, 2 Plowd. 557, is "as long as the church of St. Paul shall stand". *Brattle Square Church v. Grant*, 3 Gray, 142, 147; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Ashley v. Warner*, 11 Gray, 43; *Attorney General v. Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Fifty Associates v. Howland*, 11 Met. 99, 102; *Owen v. Field*, 102 Mass. 90, 105; 1 Washb. Real Prop. (3d ed.) 79; 2 Washb. Real Prop. (3d ed.) 20, 21; 4 Kent Com. 126, 127, 132, note; 2 Crabb, Real Prop. 2135, 2136; 2 Flint. Real Prop. 230, 232; *Shep. Touchst.* 121, 125.

A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the Statute *Quia Emptores*. See Gray, Rule against Perpetuities, 31-40, where the question is discussed and authorities are cited. We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159, 168; *Leonard v. Burr*, 18 N. Y. 96; *Gillespie v. Broas*, 23 Barb. 370; *State v. Brown*, 3 Dutch. 13; *Henderson v. Hunter*, 59 Penn. St. 335; *Wig-*

gins Ferry Co. v. Ohio & Mississippi Railway, 94 Ill. 83, 93; 1 Washb. Real Property. (3d ed.) 76-78; 4 Kent Com. 9, 10, 129. See also, of English works in addition to citations above, Shep. Touchst. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig. tit. 1, 72-76; 2 Flint Real Prop. 136-138; 1 Prest. Est. 431, 441; Challis, Real Prop. 197-208.

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark.

This is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of land upon a condition subsequent. The exact nature and incidents of this right need not now be discussed, but it represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines. (Citations.)

Clark's possibility of reverter is not invalid for remoteness. It has been expressly held by this court, that such possibility of reverter upon breach of a condition subsequent is not within the rule against perpetuities. *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Soc.*, 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness, the other should not be. The very many cases cited in *Gray's Rule against Perpetuities* 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous in principle. * * *

This being so the plaintiffs title must be deemed imperfect and the entry must be. Bill dismissed.

DOE d. BLOMFIELD v. EYRE.

5 C. B. 713. (1848)

PARKE, B., now delivered the judgment of the court:

This case comes before us on a writ of error on a judgment of the Court of Common Pleas on a special verdict. The facts of the case are fully stated in the special verdict. It is unnecessary to advert to them in detail; a very short statement is sufficient to explain the questions which we have to decide.

On the marriage settlement of Mary Sida, a copyhold estate of which she was seised in fee, was settled to the use of her husband for life, and, after his death, to the use of Mary Sida, for life, and, from and after her decease, to the use of such child or children of the body of Mary Sida, by her intended husband and for such estates or other interest and in such parts, shares, or proportions, as Mary Sida, by any deed or writing, sealed in the presence of, and attested by, two witnesses, or her last will, duly executed, might direct and appoint; and, for want of such appointment, to the use of all the children of the marriage, as tenants in common in tail; and, in default, to Mary Sida, in fee.

Mary Sida, in the lifetime of her husband, and then having two sons, made a will, duly executed according to the power, and appointed the estate to her eldest son, John Bloomfield, and his heirs and assigns forever, upon condition that he should pay to her other son £200, within a year and a day after her husband's death, in case he should be living, and twenty-one years of age, etc.; but, if neither of her sons should be living at the decease of her husband, she appointed the estate to her father-in-law, his heirs and assigns upon certain trusts.

The testatrix died in 1782. John Bloomfield, the devisee, died in 1820, in his father's lifetime, leaving the lessor of the plaintiff, his youngest son and customary heir; and the father died afterwards, in 1820. William Bloomfield, the second son, had previously died, in 1767.

This action was brought in 1841. The defendant defended for six-seventh parts of the property; and the question is, whether the lessor of the plaintiff is entitled to recover those six-sevenths.

The Court of Common Pleas decided that he was not; and we are of opinion that their decision was correct.

Two objections were made to the title of the lessor of the plaintiff

The first objection was, that there was no dispensation of coverture in the power given to Mary Sida; and that her execution of the power during coverture, was therefore void. The second was, that John Bloomfield, the son, had no estate which descended to the lessor of the plaintiff.

We intimated our opinion, in the course of the argument, that it was clear that there was in this case, an implied dispensation of coverture, and that there could be no doubt that the meaning of the settlement was, that the power should be executed by Mary Sida whether she were sole or covert.

The second was the principal question. It was contended, on behalf of the defendant in error, that the appointment to the son was altogether void, by being so connected with the appointment to the father-in-law that it could not be separated. If this was so, the plaintiff could not be entitled to recover. But the learned counsel for the plaintiff in error, argued, that the appointment was not altogether void, but gave a vested defeasible estate in fee to the eldest son; and that the appointment over alone was void.

Admitting that argument to be correct,—as we think it was,—we are of opinion, that, in the event which has happened, this estate was put an end to, and, consequently, that the lessor of the plaintiff is not entitled.

The learned counsel contended, that, where there is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became, impossible to be performed, the defeasible estate was made absolute; and he cited *Co. Lit.* 206a. Of this there is no doubt; the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testatrix meant the estate to be defeated? Was it—if the two sons should die in the father's lifetime? or was it—if they so died, and the estate should, by law, vest in the father-in-law? In the former case, the plaintiff would fail; in the latter, he would succeed.

This question is not peculiar to cases of appointments under powers; it might arise upon an ordinary will. If a testator were to devise to A. B. in fee, and to direct, that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear, that if A. B. died in the lifetime of J. S., he, A. B., or rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case, by his will says: "If A. B. dies in the life-

time of J. S., I do not mean that A. B. or his heirs should any longer have the estate." The estate of A. B. is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over. So, in the case before us: the testatrix (for, for this purpose, she may be treated as an ordinary testatrix), says, in substance: "If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property; but I give it over to strangers." That which defeats the estate of John, is the death of himself and brother in his father's lifetime,—not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event which happened, he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain is, that she has not expressed any intention, that in the events which have happened, John should take: and, as he could only be entitled by virtue of an expressed intention in his favor, we think that he fails to establish any right.

Judgment affirmed.

Note: See discussion of this case in *Tiffany Real Property*, 1st ed., § 148, note 270.

CHAPTER XII.

RULE AGAINST PERPETUITIES.

SEAVER v. FITZGERALD.

141 Mass. 401; 6 N. E. 73. (1886)

Writ of entry dated July 31, 1884, to recover a parcel of land in Lawrence. The plea was *nul disseisin*. Trial in the superior court before GARDNER, J., who found the following facts:

The demandant claims title to the premises by descent, as next of kin and heir at law of Annie J. Rafferty. One Hugh Rafferty, at the time of his death in 1873, was seised in fee simple and possessed of said premises. Said Hugh left a last will and testament, which was duly proved and allowed the material part of which was as follows:

"Item 12. I give, bequeath, and devise all the remainder of my property, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled to at the time of my decease, to my said executors, Patrick Sweeney and Thomas H. Conway, to hold in trust, to use so much of the income thereof as shall be needed to give my daughter, Annie J. Rafferty, a good and suitable support so long as she shall live; also, if she shall ever have a child, or children, my said executors shall support them in a proper manner from said income or property during the life of each and all. The balance of said income and the property, after death of my said child and her child or children (if any), shall all be paid over by my said executors for the sole use and benefit of the Augustinian Society of Lawrence, a body corporate, duly established by the laws of this commonwealth in the year of our Lord eighteen hundred and seventy, to said corporation forever."

At the time of said Hugh Rafferty's death, his sole heir and next of kin was his daughter, Annie J. Rafferty, named in said will. She died at said Lawrence in 1879, intestate, unmarried, and without issue. The demandant is her heir; being the sister of said Hugh Rafferty. The tenant, Fitzgerald, is in possession of said premises claiming a title in fee thereunto under a deed from the Augustinian Society,

named in said will, to whom said trustees conveyed the same after the death of Annie J. Rafferty.

Upon the foregoing facts the judge ruled that the demandant could not maintain her action.

C. ALLEN, J. There is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, providing the vesting of the estate in the latter is not postponed too long. *Loring v. Blake*, 98 Mass. 253; *Evans v. Walker*, 3 Ch. Div. 211; *In re Roberts*, 19 Ch. Div. 520; *Lewis Perp.* 417-511.

In all the cases cited by demandant's counsel, the gift over was to persons who might not be ascertainable with certainty within the allowed time. But the present case is not of that class. There was no contingency or uncertainty as to who should finally take. The estate or interest vested in the Augustinian Society, a body corporate, absolutely and at once, upon the testator's death, subject to the preceding life estates. All that is required by the rule against perpetuities is that the estate or interest shall vest within the prescribed period. The right of possession may be postponed longer. Moreover, the devise was to take full effect, with right of possession, upon the death of the testator's daughter, Annie, if she should leave no child. In point of fact, she left none. Therefore, in this alternative contingency, not only the estate but the right of possession, would certainly vest within the permitted period; and as this contingency is the one which happened, the validity of the devise would not be affected by the consideration that the other contingency might be too remote. *Jackson v. Phillips*, 14 Allen, 572, and cases there cited.

On both grounds the entry must be, judgment for the tenant.

Note: There is an extensive note on the subject of Rule against Perpetuities, in 49 Am. St. Rep. 117.

COWELL v. COLORADO SPRINGS CO., *Supra*, 196.

BARBER v. PITTSBURGH, F. W. & C. RY. CO.

166 U. S. 83; 41 L. Ed. 925; 17 Sup. Ct. 490. (1897)

* * * MR. JUSTICE GRAY delivered the opinion of the court:

The real question between the parties, upon which the decision of this case must turn, is what estate Amanda Stephens took under the will of James S. Stevenson, by which he devised to her certain lots of land in Pittsburgh, and further provided as follows: "In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber."

The testator duly published his will on October 16, 1831, and died on the same day, being 50 years old. At that date John Barber was alive and married, and had children, some of whom are plaintiffs in this action of ejectment. Amanda Stephens, then a child of five years of age, and so described in the will, survived the testator, and afterwards married. She and her husband executed a deed of the land, intended and sufficient to bar an estate tail therein, and afterwards conveyed the land in fee simple to the defendants and others.

The testator died, and his will took effect before the passage of the statute of Pennsylvania of April 8, 1833 (chapter 128, par. 9), providing that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate"; and long before the statute of April 27, 1855 (chapter 387, par. 1), providing that "whenever hereafter, by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable." Laws Pa. 1832-33, p. 249; Laws 1855, p. 368; Purd Dig. (12th Ed.) 2103, par. 11; Id. 810, par. 8.

* * *

This brings us to the second question, which is, "What estate did Amanda Stephens take under the devise?"

In *Eichelberger v. Barnitz*, above cited, decided in 1840, the court, speaking by Mr. Justice Sergeant, said: "The principle has now become a settled rule of property, in relation to lands, that if a devise be made to one in fee, and if he die without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to

another in fee, the estate of the first taker is a fee tail, which, if he have issue, passes to them *ad infinitum* by descent as tenants in tail." And this rule was applied to a devise in which the contingency was expressed in the words: "My will is, because my son Henry is not yet married, that if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my other three children." 9 Watts. 450, 451.

In *Middleswarth v. Blackmore* (1873) 74 Pa. St. 414, 419, the court, speaking by Mr. Justice Mercur, and referring to *Eichelberger v. Barnitz*, above cited, and other cases; recognized and affirmed that "as a general rule, and standing alone, the language, 'die without leaving any legitimate issue', must be understood to mean issue indefinitely; that the estate created would, in such case, have been one in tail"; and denied such effect to those words only because of the general scope of the particular will, and of the land being thereby charged with the payment of certain sums to persons living, and required, in case of the happening of the contingency named, to be sold by the testator's executors, and the proceeds, after paying those sums, to be distributed among his grandchildren.

Again, in *Lawrence v. Lawrence* (1884) 105 Pa. St. 335, a devise of land to the testator's two nephews, "and their heirs, as tenants in common," but, if one of them "should die without leaving lawful issue," his share to go to the other, "his heirs and assigns, forever," was held to create an estate tail in the nephews; and Mr. Justice Trunkey, in delivering judgment, said that it had not been doubted, since the decision in *Eichelberger v. Barnitz*, above cited, that the rule in Pennsylvania is that "the established interpretation of words of limitation on failure of issue, whether the terms be "if he die without issue," "If he die without having issue", "If he have no issue", or "if he die before he has any issue", in absence of all words making a different intent apparent, is that they import a general indefinite failure of issue, and not a failure at the first taker's death." 105 Pa. St. 339.

In *Reinoehl v. Shirk* (1888) 119 Pa. St. 108, the testator devised real estate to two children of his deceased son in fee, and, if either should "die without leaving lawful issue" his share to go to the survivor, and "if both of the said children should die without leaving lawful issue" the real estate devised to them to go to the testator's other children, and directed that under no circumstances should his son's divorced wife have any part of the testator's estate. The court, speaking by Mr. Justice Sterrett, held that the children of the son

took an estate tail, and said that since *Eichelberger v. Barnitz*, above cited, it had undoubtedly been the rule in Pennsylvania that, standing alone, the words "die without leaving issue", or other expressions of the same import, mean a general indefinite failure of issue, and not a failure at the death of the first taker.

In *Hackney v. Tracy* (1890) 137 Pa. St. 53, 20 Atl. 500, a testator, who made his will in 1854 and died in 1864, devised real estate to his daughter Elizabeth, "but, in case my daughter Elizabeth should die without issue, then, in that case, all her interest that she might or could have in the same to descend to my daughter Mary"; and it was held, in an opinion delivered by Mr. Justice Green, reviewing the previous cases, that the devise over was upon an indefinite failure of issue of Elizabeth, and that she took an estate tail, enlarged by the act of 1855 into a fee simple.

Like decisions were made in 1892 in two cases, in one of which the devise was to a daughter in fee simple, "provided, nevertheless, that in case she shall die without leaving lawful issue, then it is my will that the property above devised to her shall be equally divided among the children of my brother" (*Ray v. Alexander*, 146 Pa. St. 242, 23 Atl. 383); and in the other the testator, after devising to his wife an estate for life, provided that "in case either of my daughters shall die without issue, either before or after the decease of my wife, then the amount of their share or shares in the residue of the estate shall revert back to the remainder of my children, share and share alike," and "the share or shares that such of my daughters as may be without issue before or after the death of my wife may be entitled to" should be invested and the income paid to them, "and after her death the residue of the estate is to be divided, share and share alike, among those of my heirs that are then alive" (*Hoff's Estate*, 147 Pa. St. 636, 23 Atl. 890).

In view of this series of adjudications of the highest court of the state, extending over more than half a century, we cannot but accede to the opinion expressed by Judge Acheson, with the concurrence of Judge Buffington, in the circuit court of the United States, in the case at bar, that "it is firmly established by an unbroken line of authorities that a devise over to named living persons, upon the failure of issue of the first taker, does not import a definite failure of issue"; and that "to hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles." 69 Fed. 504, 505.

It has also long been regarded as established law in Pennsylvania

that such words as "in case of his death unmarried or without issue," in this connection, are equivalent to simply "dying without issue", unless there is something else in the case to warrant and require a different construction of the will. *Vaughan v. Dickes* (1853) 20 Pa. St. 509, 513; *Matlack v. Roberts* (1867) 54 Pa. St. 148, 150; *McCulloch v. Fenton* (1870) 65 Pa. St. 418, 426.

The result of the foregoing considerations is that, by a settled rule of property in Pennsylvania, the devise to Amanda Stephens, with a devise over "in the event of Amanda dying unmarried, or, if married, without offspring by her husband", gave her an estate tail, unless this conclusion is controlled by other words in the will, or by the facts stated in the certificate of the circuit court of appeals.

Indeed, the reasoning of Chief Justice Sterrett upon the construction of the clause, "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," would seem to point to the same conclusion. That reasoning, in his own words, above quoted, is that "the word 'offspring,' here used, is but a synonym for 'issue'"; that "'issue' cannot be lawful without marriage"; that "the devise is, then, in the event of her dying without issue, over to" the heirs of John Barber; and that "dying without issue was thus made the contingency upon which" those heirs could take. 165 Pa. St. 649, 31 Atl. 67. Assuming the correctness of that inference, namely, that the contingency described was simply "dying without issue", these words would import an indefinite failure of issue, according to the long line of authorities above cited, beginning with the judgment delivered by Mr. Justice Sergeant in *Eichelberger v. Barnitz*, and including the judgment delivered by Mr. Justice Sterrett in *Reinoehl v. Shirk*, and would be inconsistent with the conclusion of the court that the devise over to the heirs of John Barber must take effect, if at all, upon the death of the testator.

The supreme court of Pennsylvania considered that conclusion to be strengthened by two special considerations: First. "That, in the absence of a fixed period, the power of sale was intended to be exercised at a near rather than a remote period after the testator's death", because, as said in *Wilkinson v. Buist*, 124 Pa. St. 253, 261, 16 Atl. 856, "a power of sale without limit would doubtless be bad, under the rule against perpetuities." Second. "That testator had in view living persons as substituted beneficiaries,—the gift over is to the 'heirs', and therefore the children, of John Barber, who was living,—and the natural inference is he intended them to take as such." 165 Pa. St. 650, 651, 31 Atl. 68.

But there does not appear to this court to be anything in the will indicating that the time, either of executing the power of sale of this land, or of ascertaining the persons who are to take the proceeds of its sale, must be upon or soon after the death of the testator.

The words, "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," which, as has been seen, import of themselves an indefinite failure of issue, and therefore an estate tail in Amanda, are followed by the words, "then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber."

There is no direction that the sale of these lots shall be made by the executors. The sale is to be made upon the expiration of the estate tail; and a power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Cresson v. Ferree*, 70 Pa. St. 446, 449; *Heasman v. Pearse*, L. R. 7 Ch. 275; *Gray*, *Perp. par.* 447, 490.

The persons who are to take under the limitation over are described as "heirs of John Barber." Although, strictly speaking no one is the "heir" of a living person, yet a devise to the "heirs" of a person named (who is a living person, and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect. *Darbison v. Beaumont*, 1 P. Wms. 229, Fortes. 18; *Goodright v. White*, 2 W. Bl. 1010; *Heard v. Horton*, 1 Denio, 165. That this testator used the word in this meaning is confirmed by the clause in which he directs the residue of his estate to be sold and divided into sixteen shares, of which he gives two shares "to John Barber", and two other shares "to the heirs of John Barber". But the word "heirs" is not limited in its own meaning, or by anything in this will, to children, and applies either to John Barber's children, or to his more remote descendants, whichever may be his heirs if he be dead, or his heirs apparent if he be living, when the devise in question takes effect.

The facts added, by way of amendment, to the second paragraph of the certificate of the circuit court of appeals, are wholly immaterial. Evidence of extrinsic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will, but never to control the construction or extent of devises therein con-

tained. As said by this court, speaking by Mr. Justice Grier: "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised." *King v. Ackerman*, 2 Black, 408, 418. See, also, *Allen v. Allen*, 18 How. 385. To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony to the testator's state of health at the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence.

For the reasons above stated, this court is of opinion that the answer to the second question certified by the circuit court of appeals must be that Amanda Stephens took an estate tail under the devise to her.

Ordered accordingly.

BRATTLE SQ. CHURCH v. GRANT.

3 Gray, 142; 63 Am. Dec. 725. (1855)

This was a bill in equity by plaintiff for leave to sell certain property which had been devised to the deacons of the Church of Christ in Brattle Street in Boston, and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare the bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esq., and to his heirs forever."

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was

widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real estate to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the court in making a decree for a sale of the premises upon the reason and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise and render it necessary to determine the respective rights of the devisees and heirs at law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle street. If the gift had been solely to the deacons of the church in Brattle street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate. *Anc. Chart.* 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors; and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was

the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if we are able in the first place to determine with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or deviser, and his heirs. Upon a breach of the condition the estate of the grantee or devisee, was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach. 2 Bl. Com. 166; 4 Kent. Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent, estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument

or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference, therefore, between an estate in fee on condition and on a conditional limitation is briefly this, that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition

or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation; under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder as well as gifts and grants which, when made by will, are termed executory devises, and when contained in conveyances to uses assume the name of springing or shifting uses: 1 Preston on Estates, 40, 41, 93; 4 Kent Com. (6th ed.) 128; note; 2 Fearn's Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192, and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event; and not in abridgement of it. Thus a devise to A for twenty years, remainder to B in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A until C returns from Rome, and then to B in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A and his heirs till C returns from Rome, then to B in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contin-

gency. One of the tests therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate. 1 Jarman on Wills, 780; 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate: 4 Kent Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualifications annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estates nor remainder; there is no particular estate, which is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance; and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a *quasi* corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of

the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise. 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig., tit. 38, c. 17, 1, 2; *Purefoy v. Rogers*, 2 Saund. 388a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore a deviser disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise. 4 Kent Com. 268; 6 Cruise Dig., tit. c. 17, 2; Bac. Ab. Devise, I.; 1 Fearné Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the deviser by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not made to take effect upon a

contingency which is too remote, as violating the well-established and salutary rule against perpetuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, or recovery or otherwise. 4 Kent Com. 266; 2 Saund. 388a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities. 4 Kent Com. 267; 1 Jarman on Wills, 221; 4 Cruise Dig., tit. 32, c. 24, 18; Nightingale v. Burrell, 15 Pick. 111; see, also, Cadell v. Palmer, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases, on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect. Nightingale v. Burrell, 15 Pick. 111; 4 Kent Com. 283; 6 Cruise Dig., tit. 38, c. 17, 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2nd ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes,

within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person, who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitation by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendible: *Bacon v. Proctor*, Turn. & Russ. 31; *Mackworth v. Hinxman*, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: *Ker v. Lord Dungannon*, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency

upon which it was to take effect was not restricted to the proper limits. *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dru. & War. 245, 253. In this case Lord Chancellor Sugden says: "This is a clear equitable devise of a fee qualified or limited; a fee in surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz.; while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterward. It can make no difference in the application of the case cited that it was the gift of an equitable fee-simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity. *Lewis on Perp.* 169; 4 Cruise Dig. tit. 32, c. 24, 1; *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond (on the premises) should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is

void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test, to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent Com. 130; Co. Lit. 206a, 206b, 223a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect, as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee; *Tilbury v. Barbut*, 3 Atk. 617; *Tyte v. Willis*, Cas. temp. Talb. 1; 1 Fearné Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever,

and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute. Nottingham v. Jennings, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearne Cont. Rem. 467; Attorney-General v. Gill, 2 P. W. 369; Busby v. Salter, 2 Preston's Abstracts, 164; Kampf v. Jones, 2 Keen, 756; Ring v. Hardwick, 2 Beav. 352; Miller v. Macomb, 26 Wend. 229; Ferris v. Gibson, 4 Edw. Ch. 707; Tator v. Tator, 4 Barb. 431; Conklin v. Conklin, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were ingrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker. 6 Cruise Dig., tit. 38, c. 12, 20; Co. Lit. 18a, 271b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise if, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless. Shep. Touch. (Preston's ed.) 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate

vested in the eldest son of A. as heir male, discharged of the gift over. *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. So in the case at bar the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the *Touchstone*: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void;" "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases. *Shep. Touch.* 129, 133. See, also, 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate to John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law. 1 *Pow. Dev.* 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause. 2 *Pow. Dev.* 102-104;

Hayden v. Stoughton, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remains in the donor or devisor, which would pass under a residuary clause, or in case of intestacy to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation. 2 Cruise Dig., tit. 16, c. 2, 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible, on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may, therefore, be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

CHAPTER XIII.

CONCURRENT OWNERSHIP.

CASE v. OWEN.

139 Indiana, 22; 47 Am. St. Rep. 253; 38 N. E. 395. (1894)

COFFEY, J. The only question involved in this case relates to the construction of the following deed, viz:

"This indenture witnesseth, That Barney White and Ruth White, of Hamilton county, and State of Indiana, convey and warrant to Lydia Reese and John Reese, jointly, of Hamilton county, in the State of Indiana, for the sum of fifteen hundred ninety-seven dollars and fifty cents, the following real estate in Hamilton county, to wit: (here follows description). In witness whereof, etc."

It is contended by the appellants that, under this deed, Lydia Reese and John Reese, took as tenants in common, while the appellees contend that they took as joint tenants.

An estate in joint tenancy is an estate held by two or more tenants jointly, with an equal right in all to share in the enjoyment of the land during their lives. Upon the death of any one of the tenants, his share vests in the survivors. Four requisites must exist to constitute a joint tenancy, viz: 1. The tenants must have one and the same interest; 2. The interests must accrue by one and the same conveyance; 3. The interests must commence at one and the same time; 4. It must be held by one and the same undivided possession: 6 Am. & Eng. Ency. of Law, 891.

A joint tenancy can be created in no other way than by purchase, and its distinguishing feature is that of survivorship. The doctrine of joint tenancy is not favored by the American law, and the rules relating to such estates have been greatly modified by statute in most of the states of the union.

Our statute, Revision of 1894, section 3341, provides that all conveyances and devises of land, or of any interest therein, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the

grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

This statute completely reverses the ancient common-law rule, for joint tenancy was a favorite of the ancient common-law, and no special words or limitations were necessary to call it into existence, but, on the other hand, words or circumstances of negation were indispensable to avoid it: Freeman on Cotenancy and Partition, sec. 18. Under this statute, however, it must be created by express words or limitations.

The question for our decision, therefore, is, Does the use of the word "jointly" in this deed have the effect of vesting in Lydia Reese and John Reese an estate in joint tenancy?

It is a familiar rule that in construing a deed, as in construing any other written instrument, it is to be considered as a whole, and that effect is to be given to each and every clause and word found in it if that is possible.

As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles, the word "jointly" can find no place in describing an estate to be held by them.

To hold that this deed created in the grantees a tenancy in common, we would be compelled to strike out and wholly reject the word "jointly". This we are not at liberty to do. Under the well-known rules of construction we are required to give it effect; and when that is done we are constrained to hold that this deed vested in Lydia Reese and John Reese an estate in joint tenancy: *Barden v. Overmeyer*, 134 Ind. 660; *Thornburg v. Wiggins*, 135 Ind. 178; 41 Am. St. Rep. 422.

As this is in accord with the conclusion reached by the circuit court, the judgment should be affirmed.

Note: A different conclusion as to the effect of the word jointly was reached in *Mustain v. Gardner*, 203 Ills. 284; 67 N. E. 779.

MARTIN v. SMITH.

5 Binney, 16; 6 Am. Dec. 394. (1812)

TILGHMAN, C. J. The first question in this case arises on the will of William Robertson. The testator in the first place gives legacies of different amounts to his ten children, after which he expresses himself as follows: "Item. — I will that if any of my legatees die without natural heir, that my bequeathments return into my family to whom they please; and further, I allow my personal estate, either by vendue, or otherwise, and then what ready money is made, and likewise what bonds or notes are taken and made, shall be equally divided amongst my legatees by equal proportions at the discretion of my executors; and further, I allow that my estate, personal or real, shall overmount these my bequeathments, that then the overplus shall fall to my four sons whom I now name: William, David and Joseph Robertson, two-thirds. Item. — I will that one-third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children."

It plainly appears, from the whole will, that the testator was an ignorant and illiterate man. Whether the devise to his three daughters was in joint-tenancy or tenancy in common, is the point to be decided. When a man is providing for his children, by his will, nothing can be more unnatural than an estate in joint-tenancy. It is with good reason, therefore, that courts of justice have long been disposed to lay hold of slight expressions, in order to make a tenancy in common. I confess that I feel this disposition in my own mind, but it shall never influence me so far as to shake the established rules of property.

Where an estate is given to several persons jointly, without any expressions indicating an intention that it should be divided among them, it must be construed as a joint-tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intent that the estate should be divided, it then becomes a tenancy in common. The counsel for the defendants in error have relied on that part of the will in which it is said that if any of the legatees die without natural heir, the bequeathment should return to the testator's family, to whom they please; that is to say, the legatee dying without issue might devise it to any of the family he pleased. If this provision could be applied to the subsequent devises,

it would certainly afford sufficient ground for saying that there could be no joint-tenancy, because there would be an evident intent to take away the right of survivorship; but I agree with the counsel for the plaintiffs in error who apply these expressions to the prior devises. That is the plainest and most natural construction. The defendants in error say in the next place, that at all events the surplus of the personal estate, after paying debts and legacies, was to be equally divided; but there again I differ from them. The testator's meaning, to be sure, is not very clearly expressed, but I am satisfied he intended that the legacies he had given in the first part of his will should be paid partly in cash and partly in notes or bonds, in equal proportions, at the discretion of his executors; because he speaks of a sale of his personal property at vendue, and of bonds or notes being taken. This accords with the common custom of the country, which is to make sale of the property of deceased persons at auction, and receive payment part in cash and part in bonds or notes on a short credit.

It is clear that the testator did not intend to give the whole surplus of his personal estate to be equally divided among all his children, because immediately after the devise, which is supposed to contain such a disposition, he declares his belief that there would be a surplus, which would overmount his prior bequeathments, and proceeds to dispose of that surplus, whether personal or real, not among all his children, but among part of them. There is a considerable inaccuracy in the devise to his sons. The expressions are, to my four sons whom I now name; and yet he goes on to name but three only. It is said to have been decided formerly by two judges of this court, that the three sons took as joint-tenants. That question not being now before us, I throw it altogether out of consideration, except so far as it may fairly be viewed as shedding light on the devise to the daughters. In that respect I do not think it of weight, as the devise to the daughters contain certain expressions, which cannot by any reasonable construction be controlled by the preceding devise. The testator gives one-third of the surplus to his three daughters, naming them; but declares that Mary Crosher's part shall go, not to her, but to her children; this explanation makes the devise not to his daughter Mary, but immediately to her children.

Both the expressions, and the intent of the devise, are inconsistent with a joint estate. In joint-tenancy there are no parts. All have an undivided interest in the whole. The moment you introduce the idea of separation, the fabric of joint-tenancy is dissolved. Any intima-

tion by the testator of a division or a severalty of interests, is sufficient to make a tenancy in common. Now what must have been the intent in the present instance? It would be absurd to suppose the testator knew anything about the legal import of his words; but it is clear he did not intend to give an equal right of survivorship, between his daughters Margaret and Elizabeth, and the children of his daughter Mary. The children of Mary were to take among them one-third of a third of the surplus; but Margaret and Elizabeth were to have each one-third of a third. Consequently if one of the children of Mary died, the interest of that one would go to his surviving brothers and sisters, to the exclusion of his aunts Margaret and Elizabeth. Thus the share belonging to the children of Mary must be considered as detached from the shares of their aunts, and this is to all intents and purposes a tenancy in common.

But it has been urged, that whatever may be the case as to the children of Mary, there will be a joint-tenancy between Margaret and Elizabeth, because there is no intimation of several interests between them. To this argument I cannot accede. The joint-tenancy, if it exists at all, is created by the same devise which must be applied to all the devisees. There is no color for contending that the testator meant to create a joint-tenancy between Margaret and Elizabeth only, and to give a separate interest to the children of Mary. On the contrary, the fair conclusion is, that if there was a severalty as to one, there was a severalty as to the others. In other words, that this remaining third part of the surplus was to be divided into three parts, one of which was to go to Margaret, one to Elizabeth and one to the children of Mary. Whether those children took their proportions in joint-tenancy, or in common between themselves, I give no opinion. I am clear that it was the testator's intent to divide the surplus in the manner I have mentioned, and that his expressions will warrant us in construing the will accordingly. * * *

YEATES, J. William Robertson, after devising his real estate, and bequeathing divers specific and pecuniary legacies, uses the following words in his will: "I allow that my estate personal or real shall overmount these my bequeathments; that then the overplus shall fall to my four sons, whom I now name, William, David and Joseph Robertson, two-thirds. Item. — I will that one-third of the overplus to my three daughters, Margaret Carnahan and Elizabeth Smith and Mary Crosher, her part of that third to her children."

Elizabeth Smith died after her father, before his executors had settled their administration account; and the first question is, whether

her share survived to her sister Margaret and the children of her sister Mary, or whether it vested in her husband John Smith, who had since taken out letters of administration on her estate?

There is no doubt that there may be joint-tenants of personalities; as where a horse is given to two, they are joint-tenants. But if one sells his share to another, this severs the joint-tenancy, and the vendee and the other person are tenants in common, and no survivorship: Lit., s. 282, 321; 1 Vern. 482; 2 W. Bl. 399. But joint undertakings in the way of trade or the like, are not liable to survivorship: 1 Vern. 217; 1 Ch. R. 31; 2 Fonb. 106.

The properties of a joint-estate are derived from its unity, which is fourfold, of interest, title, time and possession: 2 Bl. Com. 180. Joint-tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they, each of them, have the entire possession, as well of every parcel as of the whole. They have not one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one exclusively be seised of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety: Ib. 182; Lit., s. 288; 5 Co. 10.

Joint-tenancies were formerly favored at law, because they were against the division of tenures; but as tenures are, many of them, taken away, and in a great measure abolished, that reason ceases, and courts of law now incline against them as much as is done in equity. They are a kind of estate that does not make provision for posterity. Chancery will decree in favor of a tenancy in common as much as it can. If, indeed, there are no words that will point at a tenancy in common, the rule of survivorship in a joint devise must take place; but a joint tenancy will never be inferred where a testator meant division. Hence it is that in wills the words "equally to be divided" make a tenancy in common according to the intent of the deviser, although they never make any partition *in facto*, for his intent appears, that it shall be divided, and by consequence that there shall be no survivor: 3 Co. 39b. So the word "equally" alone, without other words: 3 Atk. 733. So of the word "alike": Cowp. 357, determined in 1775. And so also in other cases, where the word "among" or "between" has been used. It is laid down that the expressions, "share and share alike," have been held these two hundred years to create a tenancy in common: by Parker, Justice, 2 Atk. 122.

The inaccuracy of language, as well as orthography, of the will

under consideration, clearly mark the drawer of it to be an illiterate person; but the intention of the testator as to the matter in controversy can readily be collected. When he "devised to his three daughters, Margaret Carnahan, Elizabeth Smith and Mary Crosher, her part of that third to her children," one-third of the surplus of his estate, he evidently points to a division between them. These words are synonymous to the expressions I have already cited, which have been held to create a tenancy in common. Part is the contrary of whole; and Margaret, Elizabeth and Mary's children (representing the mother) cannot be said to hold an undivided third part of the whole, when an undivided ninth part is plainly given to those children. I am, therefore, of opinion that Elizabeth did not take in joint-tenancy under the true meaning of the will. * * *

OVERTON v. LACY.

6 T. B. Monroe, 13; 17 Am. Dec. 111. (1827)

OWSLEY, J. On the eleventh of May, 1780, Clough and Waller Overton made an entry for six hundred acres of land, on a treasury warrant, etc., and on the second of September, in the same year, two adjoining surveys of three hundred acres each, were made upon the entry in their joint names. Afterwards, on the first of September, 1782, an inclusive patent for the land contained in both surveys issued from the commonwealth of Virginia to Clough and Waller Overton jointly. A few days however before the date of the patent, Clough Overton was killed by the Indians at the battle of the Blue Licks, having previously, on the sixteenth of July, 1782, made and published his last will in writing.

This will was afterwards duly proved and admitted to record. By his will, Clough Overton, devised his interest in the six hundred acres of land aforesaid, to his sisters, Elizabeth, Mary and Sarah Overton, the former of whom afterwards married Batt C. Lacy, and the latter after marrying William C. Lacy, departed this life, leaving an only child, John Overton Lacy. Subsequently to this, but many years ago, Batt C. Lacy, in right of his wife, Elizabeth, and William C. Lacy, as the natural guardian for his son, John Overton Lacy, entered upon one of the surveys which was made under the entry for six hundred acres, claiming the same under the devise of

Clough Overton to his sisters, and they have remained in the possession thereof ever since.

Conceiving, however, that under the patent which issued in the name of him and his deceased brother, Clough Overton, jointly, that he was entitled to the whole six hundred acres of land, Waller Overton commenced an ejectment against the Lacy's for the land of which they were possessed, and finally succeeded in recovering judgment.

Batt C. Lacy and his wife, Elizabeth, John Overton Lacy, by William Lacy, his next friend, and Mary Overton, then exhibited their bill in equity, with injunction against Waller Overton. Among other things contained in their bill, they set out an agreement, which they allege to have been made between the testator, Clough Overton and Waller Overton, after the date of the entry, and before it was surveyed, to divide the land between them, each to have three hundred acres by metes and bounds; and they charge that in pursuance to that agreement the two surveys were made, and that the one now in their possession was to belong to Clough Overton, and the other to Waller. They, therefore, contend that although the agreement was never, in the lifetime of Clough Overton, entirely fulfilled by the parties executing to each other written transfers for the land to which they were respectively entitled, yet by the agreement each became equitably entitled to a several interest, and they insist that in a court of equity that agreement should be specifically executed, and Waller Overton perpetually enjoined from disturbing their possession, and decreed to surrender to them any title which he may be supposed to have to the survey upon which they reside, etc.

Waller Overton admits the recovery of a judgment in the ejectment by him, insists that the legal title to the whole six hundred acres is in him, and contends that no such agreement was ever made between him and Clough Overton, for a division of the land, as should be specifically decreed by a court of equity, etc.

On hearing, the circuit court made the injunction perpetual against the judgment at law, and decreed Waller Overton to surrender his title to the land in contest to the complainants. To reverse that decree, this writ of error has been prosecuted by Waller Overton.

The position assumed by the plaintiff in error, that by the emanation of the patent, the entire legal right of entry vested in him will not be contested by us. Clough Overton having died before the date of the patent, he, of course, could then take no estate, and though named as one of two joint patentees, the title to the land, nor

any part thereof, can not, according to any principle of construction, have passed by the patent from the commonwealth to him. The same objection does not, however, apply to Waller Overton, the other patentee. He was living, and under no incapacity to take the title at the date of the patent, and must have acquired a title of some sort by the patent which purports to have issued to him and Clough Overton jointly. The only question is as to the description of title that passed to him. The other person named as a joint patentee with him being dead, did he take the entire title in severalty to the whole six hundred acres described in the patent, or did he take a title to but an undivided moiety of the land, and the title to the other still continue in the commonwealth? During the present term, we had occasion to decide upon the effect of a patent which purported to grant lands to two, as tenants in common, one of whom was dead when it issued from the commonwealth, and it was then held that the survivor took title to an undivided moiety only, the title to the other moiety, notwithstanding the grant, continuing to reside in the commonwealth: 5 Mon. 443. That decision we still approve. Tenants in common do not hold a joint title; their titles to land are in their nature several, and are so treated throughout all judicial proceedings. It was, therefore, no doubt correct to decide that a patent which is intended to grant an estate in common to two, does not, on account of one being dead at the time it issues, pass the entire title to the whole of the land to the survivor. A contrary decision would be giving an operation to the grant that was never intended by the grantor, and confer upon the survivor a title to which, by the clear import of the grant, he was not to be invested. But not so as respects patents which purport to grant land to two or more jointly. The title of joint-tenants is not like that of tenants in common; it is not several but joint. They hold a unity of title, are said to be seised *per my et per tout*, and as the law stood at the date of the patent in question, upon the death of either tenant, the title would go to the survivor. It is not, therefore, as in the case of tenants in common, necessary to effectuate the intention of the grantor, to limit the operation of a grant to two as joint-tenants, one of whom being dead at the date of the grant, to a moiety of the land only. The intention of the grantor and the object of the grant will be better attained by admitting the title of the whole to pass to the living grantee. The title must be so admitted to pass, unless we suppose what is altogether inadmissible, that by the very act of granting a joint title to two, one of whom is dead, a sort of legal severance of

the title intended to be granted is produced, and we thereby instead of making the grantee in being take a title which, as survivor, he would have held to the whole of the land, if the other grantee had been living at the date of the grant, and afterwards departed this life, we split the title, and make him, contrary to the plain import of the grant, take an estate in a moiety only, and hold the title to that moiety as tenant in common with the commonwealth. We shall, therefore, assume as correct the position contended for by Waller Overton, that the legal title to the whole six hundred acres is in him, and proceed to inquire whether or not the court below was correct in deciding that he should surrender the title to the three hundred acres in contest to the complainants in that court.

If there had been no agreement between Clough and Waller Overton to divide and make partition of the land, we should have no hesitation in saying that Waller Overton ought not to be compelled to surrender the title which he derived by the grant from the commonwealth to any part of the land. Having obtained the title as he did, at a time when the right of survivorship was an incident to estates held in joint-tenancy, he must occupy as favorable ground as he would have done had the grant issued in the lifetime of both him and Clough Overton, and the title which he now holds had afterwards come to him as the survivor, and although the *jus accrescendi* has never been the favorite of courts of equity, no case is recollected where those courts have assumed the power to dispense with the law, and without any agreement between the joint tenants in their lifetime to sever the estate, to compel the survivor to surrender any part of the title to the representatives of the deceased tenant.

But it is in proof in this case that before the death of Clough Overton an agreement was made between him and Waller Overton to divide the six hundred acres between them, and that in pursuance to the agreement so made, two surveys of three hundred acres each, were not only actually executed, but moreover, by mutual consent of the parties, the survey now in contest was assigned to Clough Overton, and the other survey was to belong to Waller Overton. The agreement so made was not, it is true, reduced to writing by the parties, and did not, therefore, in legal strictness, produce a severance of the joint estate; but though by parol, yet as it was entered into before the statute against frauds and perjuries had any operation in the then state of Virginia, the agreement must, we apprehend, in the contemplation of a court of equity have produced a severance,

and no reason is perceived why the agreement should not now be carried into specific execution by the decree of the court.

An agreement of the sort cannot be said to be without consideration, and it has been repeatedly decided that parol contracts made before the passage of the act against frauds, etc., may notwithstanding the after passage of the act, be enforced by the decree of a court of equity.

Understanding the agreement to have thus produced an equitable severance of the interest held by Clough and Waller Overton in the land, the right of the complainants in the court below to the decree which was pronounced by that court in their favor, is plain and obvious. Being entitled in equity to a several interest and estate in the survey in question, it was competent for Clough Overton to devise that interest to others, and the proof in the cause is satisfactory to show that he actually devised the same to two of the complainants and the deceased mother of the other.

The decree must, therefore, be affirmed, with costs.

WESTCOTT v. CADY.

5 Johns. Ch. 334; 9 Am. Dec. 306. (1821)

KENT, Chancellor: * * * It may be made a question whether the remainder over to the brother and sister of the testator was to them in joint-tenancy or in common. If the will had stopped with the bequest of the rest and residue of his estate, real and personal, to his brother and sister, "to them and their heirs forever," it would have been a joint-tenancy. In *Campbell v. Campbell*, 4 Bro. 15, the master of rolls accurately reviewed the cases, and arrived at the conclusion that where a legacy was given to two or more persons, without any other words to lay hold of to change the construction, they were joint-tenants. But almost any expression or words denoting a different intention, will alter the construction. In this case, the testator added that all the children of his brother and sister were to have "an equal share" of everything he left, and that if his brother died without children, the children of his sister "should enjoy the whole between them equally." Those subsequent words explain the testator's intention to be, that the brother and sister should take equally, as tenants in common; for otherwise their children could not

have "an equal share;" and when it is said that if his brother died without children, the children of his sister should enjoy the whole, it seems to have alluded to the part which they otherwise would not have enjoyed, and to be founded on the idea of a severance of interest between the brother and sister, in the first instance. * * *

Co. Litt. 187a.

William Ocle and Joane his wife purchased lands to them two and their heirs: After William Ocle was attained of high treason for the murder of the king's father E 2, and was executed; Joane his wife survived him; E 3 granted the lands to Stephen de Bitterly and his heirs: John Hawkins heir of said Joane in a petition to the king discloseth this whole matter, and upon a *scire facias* against the patentee hath judgment to recover the lands.

TOWN OF CORINTH v. EMERY.

63 Vt. 505; 25 Am. St. Rep. 780; 22 Atl. 618. (1891)

TAFT, J. The plaintiff claims an interest in the demanded premises by virtue of a levy of and sale upon an execution in its favor against the defendant. The defendant's interest in the premises at the time of the levy and sale arose under a deed conveying the premises to himself and wife. It is conceded that the estate created by the deed was one by entirety. This estate, created by conveyance to husband and wife, is a peculiar one. The interest of the grantees is not joint, nor in common. The parties do not hold moieties, but take as one person, taking as a corporation would take; they have but one title; each is seised of the whole, and each owns the whole. If one dies, the estate continues in the survivor, the same as if one of several corporators dies. It does not descend upon the death of either, but the longest liver, being already seised of the entire estate, is the owner of it. One tenant by entirety cannot sever the tenancy by deed, as a joint tenant can, for neither can alien so as to bind the other. Our statute of partition (Rev. Laws, sec. 1275), does not extend to this estate, and a conveyance to husband and wife is ex-

pressly excepted from the operation of the statute, (Rev. Laws, sec. 1917) abolishing joint tenancies. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him. Divorce *vinculo* does not destroy the estate, and the *jus accrescendi* takes effect upon the death of the one first dying. As an illustration of the rule that there are no moieties between husband and wife, and that they take as one person, it may be stated that when land is conveyed to husband and wife and a third person, the husband and wife take but a moiety, the third person taking a like moiety. The following citations may be referred to for authorities touching the characteristics of this estate: Co. Lit. 187; Bac. Abr., tit. Joint Tenancy, B; 2 Cruise on Real Property, sec. 35; 2 Bla. Com. 182; 4 Kent's Com. 362; Nichols v. Nichols, 2 Plow. 483; Skin. 182; Doe v. Parratt, 5 Term. Rep. 652; Doe v. Wilson, 4 Barn. & Ald. 303; Dias v. Glover, Hoff. Ch. 71; Rogers v. Benson, 5 Johns Ch. 431; Den v. Hardenbergh, 10 N. J. L. 42; 18 Am. Dec. 371; and note; Taul v. Campbell, 7 Yerg. 319; 27 Am. Dec. 508; Fairchild v. Chastelleux, 1 Pa. St. 179; 44 Am. Dec. 117; Stuckey v. Keefe's Ex'rs, 26 Pa. St. 397; McCurdy v. Canning, 64 Pa. St. 39; Wright v. Saddler, 20 N. Y. 320; Lewis's Appeal, 85 Mich. 340; 24 Am. St. Rep. 94; Chandler v. Cheney, 37 Ind. 391.

The doctrine of survivorship in case of tenancies by entirety has been repudiated in Ohio and Connecticut: Sergeant v. Steinberger, 2 Ohio, 305; 15 Am. Dec. 553; Phelps v. Jepson, 1 Root, 48; 1 Am. Dec. 33; Whittlesey v. Fuller, 11 Conn. 337. The Connecticut court admits that it is the doctrine of the English law, and seems to base its decisions upon local customs and usage. The rule has been altered, in some respects, by legislation in the states of Iowa and Illinois.

The rule is recognized in Vermont, in Brownson v. Hull, 16 Vt. 309; 42 Am. Dec. 517; is stated by Barrett, J., to be settled law, in Davis v. Davis, 30 Vt. 440; and cited approvingly in Park v. Pratt, 38 Vt. 545. The plaintiff insists that the defendant was entitled to the use, income, and profits of the estate during his life, that he had a life estate in the property, and that it was subject to levy and sale upon an execution against him alone. Such undoubtedly is the common law. The husband, during his life, is entitled to the usufruct of the real estate belonging to his wife, and no doubt by that law can convey such life estate, or encumber it, and it may be taken upon execution against him alone. This rule was in force in this state in 1844, when Brownson v. Hull, 16 Vt. 309, 42 Am. Dec. 517, was

decided, and Royce, J., stated that he supposed the estate was liable to attachment and execution at all times during the joint lives of the owners, and by this we understand he meant that the life estate of the husband could be taken upon his sole debts, but not so as to affect the right of the wife, should she survive him. But the legislature soon enacted that the rents, issues, and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband: Acts 1847, No. 37, sec. 1. By a subsequent act, it was provided that the words "issues and profits" shall be construed to include all moneys and obligations arising from the sale of such real estate: Acts 1850, No. 22; and later, the products of such real estate are in like manner protected: Acts 1861, No. 25. These provisions are embodied in our present statutes: Rev. Laws, secs. 2324, 2325. The plaintiff's counsel insist that these sections do not apply to an estate by entirety, but only to such real estate as may be owned by the wife separately. In this we think they are in error. Such an estate is the real estate of a married woman although her husband is joined with her in the title. It is the real estate of each. If the claim of the plaintiff is upheld, then the interest of the husband in his wife's right in her real estate is taken upon the sole debt of the husband. This would annul the statute. The estate of the wife, and her husband's interest therein in her right, in the property in question is protected from the husband's sole creditors by the spirit and letter of the statute. This construction has been given a similar statute in Indiana: *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471.

If the conveyance of the premises in question to the defendant and wife was a fraud upon the defendant's creditors, the latter must seek their remedy in some other action, and probably in the same manner they would be obliged to adopt in case the property had been conveyed to the defendant's wife, instead of the defendant and his wife jointly.

Judgment reversed, and judgment for the defendant.

CHAPTER XIV.

ESTATES ARISING FROM MARRIAGE.

- Section 1. Husband's Freehold during Coverture.
- Section 2. Dower.
- Section 3. Curtesy.
- Section 4. Homestead Rights.

SEC. 1. HUSBAND'S FREEHOLD DURING COVERTURE.

EATON v. WHITAKER.

18 Conn. 222; 44 Am. Dec. 586. (1846)

HINMAN, J. In order to show that the decree of the superior court is erroneous, the defendant relies, first, upon the fact found by the committee, that the estate which was the subject-matter of the agreement, belonged to the defendant's wife, he having in her right an estate during coverture, or at most, only a life estate in it. And the claim is, that a husband has no power to lease for a term of years the estate of his wife; and therefore, ought not to be compelled specifically to perform his agreement to lease it; and we are referred to the case of *Annan v. Merritt*, 13 Conn. 478, as supporting this claim.

If the claim of the defendant was correct, that a husband is incompetent to lease estate in which his only interest is such as the law gives him in right of his wife, it would doubtless follow, from the case cited and the authorities referred to in that case, that he would not be decreed to execute a contract to lease it. But we see nothing in that case that countenances the idea, that he cannot make a valid lease of his wife's real estate. We did not suppose that the rights acquired by marriage had been varied, or in any way modified, by that decision. That he cannot convey her interest in land, is very true, and so the law has always been; for the obvious reason, that he can convey only such interest as he himself has in it; and the case cited shows, that the former practice of courts of chancery, of

compelling him to cause or procure the title of his wife, to be conveyed to his vendee, upon the presumption that he must have had her consent previous to the sale, is now exploded. But we know of no law that will prevent his selling his own interest in land, however acquired. And as the law gives him an estate during coverture, and in some cases a life estate, he can of course convey it. And although it seems to be a disputed point, whether, if he lease for a term of years, and die during the term, the lease is wholly void as against the wife, or good for the whole term, unless she, after such decease, dissent to it; yet, it is nowhere said that it will not be good during the husband's life. In *Bac. Abr.*, tit. Lease, c. 1, it is said, it will be good for the whole term, unless she, by some act after the husband's decease, shows her dissent to it; and that if she accepts rent after his decease, the lease becomes absolute for the whole term. Williams, in a note to *Wotton v. Hele*, 2 Saund. 180, n. 9, doubts whether the lease is not wholly void as to the wife; but he says, it is undoubtedly good during the coverture. The defendant's lease, then, will be good for the whole term, unless previously determined by his death; and whether it is wholly void as to his wife, or only voidable, is of no importance in this suit. * * *

JUNCTION R. R. CO. v. HARRIS.

9 Indiana, 184; 68 Am. Dec. 618. (1857)

PERKINS, J. In February, 1853, a tract of land was conveyed to Ellen, then the wife of Jesse Harris. In October, 1853, said Jesse and Ellen, by a deed with full covenants of warranty, conveyed the land to the Junction Railroad Company and received pay for it. Ellen was then between nineteen and twenty years of age, and the conveyance was made by the consent and with the approbation of her father, and duly acknowledged.

This suit is now brought by said Jesse and Ellen, to recover back the land, on the ground of the minority of Ellen at the time of its conveyance to the railroad company.

Prior to 1847 a case like the present would have been without difficulty. *Butterfield v. Beall*, 3 Ind. 203, involved precisely the same principle. In that case the court said: "Upon the marriage of Caroline Johnson with Abel Butterfield, said Butterfield became

possessed of an estate for their joint lives in her real property. That estate the husband could convey: 2 Kent's Com. 133; and an attempt by him to convey the fee-simple would not render void his conveyance as to the interest he did possess: R. S. 1843, p. 417, sec. 23; Id. 425, sec. 64; 4 Kent's Com. 83. If, then, Butterfield made a conveyance, of the land in question, binding upon him, to Beall, in March, 1846, as he and his wife are still living, the right of possession of the land is in Beall, and the mesne profits of it belong to him."

So in the present case, the right to possession and profits would be in the railroad company, till the termination of the husband's life estate, and the suit would be prematurely brought. But in 1847 the legislature enacted the following law: "That no real estate whereof any married woman was or may be seised or otherwise entitled to at the time of her marriage, or which she has or may fairly acquire during her coverture, or any interest therein, shall be liable for the debts of her husband; but the same, and all interest therein, and all rents and profits arising therefrom, shall be deemed and taken to be her separate property, free and clear from any and all claims of the creditors or legal representatives of her husband, as fully as if she had never been married; provided, that this law shall not be so construed as to apply to debts contracted by such married woman before such marriage, but in all such cases her said property shall be first liable therefor." Acts of 1847, 45.

This statute, in terms, in no manner impairs the husband's rights in the real estate of his wife. It simply protects it from sale on execution for his debts. This is its literal import; and we think its operation should not be enlarged by construction: *Kelsey v. Barney*, 12 N. Y. 425.

In October, 1853, then, when the conveyance of the land was made to the railroad company, the husband had a life estate, such as is above described in the real estate in question, which he could convey; and according to the case of *Butterfield v. Beall*, 3 Ind. 203, the deed executed by him and his wife was operative to convey that estate, unless the revised statutes of 1852, which were in force when that deed was made, prevented: 1 R. S. 321, secs. 5, 6.

But we hold that it was not in the power of the legislature to deprive the husband, for the purposes contemplated by the act of 1852, of his right to that life estate, nor his right to convey it: *Westervelt v. Gregg*, 12 N. Y. 202 (62 Am. Dec. 160). See *Noel v. Ewing*, 9 Ind. 37, at the present term of this court.

The judgment is reversed with costs. Cause remanded to be dismissed.

SEC. 2. DOWER.

Litt. Sect. 36.

Tenant in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, for she must be above nine yeares old at the time of the decease of her husband, otherwise she shall not be endowed.

HOLBROOK v. FINNEY.

4 Mass. 566; 3 Am. Dec. 243. (1808)

Action for dower in a tract of land, which plaintiff demands by virtue of the seisin of her deceased husband, Ezra Finney. It was agreed that John Finney being seised of the premises in fee conveyed the same by deed bearing date March 13, 1786, to his four sons, of whom Ezra was one, in equal proportion, in fee, for the consideration of four hundred pounds; that immediately, and by a deed of even date, the four sons mortgaged the same premises to their father in fee, to secure the payment of the four hundred pounds, and a maintenance during his life; that Ezra died in December of the same year; that in 1787, the mortgagee foreclosed the mortgage for condition broken; that in 1790, the defendant, Robert Finney, became possessed of the premises, under an execution levied to satisfy a judgment against John Finney. On these facts it was submitted to the court whether the demandant was entitled to dower.

PARSONS, C. J. (After reciting the substance of the case as agreed

by the parties.) The question before the court upon these facts, is, whether Ezra Finney, the husband, was, during the coverture, so seised of the premises that the demandant has a right to her dower. He was not so seised, unless from the operation of the deed from his father to himself and his three brothers.

The tenant has made two objections: 1, That this conveyance was of an estate to joint tenants, of which the demandant's husband was not the survivor; 2, That her husband had that instantaneous seisin only, which will not entitle her to dower.

It is settled that if an estate be devised to two or more, equally to be divided, they are tenants in common. The same construction is applied to a devise to two or more, share and share alike: Show. Parl. Cases, 210. Also the words equally to be divided, in a covenant to stand seised, or in the surrender of a copyhold, or in a deed appointing uses, create a tenancy in common: 2 Vent. 365-6; 1 Salk. 391; 1 Wils. 341-2. This construction has been adopted, because the words in equal shares, or equally to be divided, import a division *in futuro*.

The words in this deed are in equal proportion; and it is said that they do not imply a future division, but are applied only to the respective interests in the thing conveyed. On this ground they must be considered as wholly inoperative; for without them the grantees would have taken an equal interest in the lands granted. To give them operation, may they not be considered as equivalent to the words, in equal purparties or shares, and thus contemplate a future partition?

But it is not necessary now to decide this point, for by the statute of 1785, c. 61, passed three days after the execution of these deeds, it is enacted that all estates which had been, or which should be, aliened to two or more persons, shall be deemed to be tenancies in common, unless it be manifestly the intent of the alienor that they should be held as joint estates, with a saving to the survivor of any estate in joint-tenancy, before created and already vested in him. This statute has a retrospective effect, and comprehends this conveyance; and there seems to be no constitutional objection to the power of the legislature to alter a tenure, by substituting another tenure more beneficial to all the tenants.

If this objection had been pressed, it would have been unnecessary to consider it, as the statute of 1783, c. 52, in force when the deeds were executed, although repealed by the last-cited statute, had abolished the principle of survivorship among joint tenants, and had

enacted that, on the death of a joint tenant, the joint estate of which he was seised should descend to his heirs. In consequence of these provisions, the wife of a joint tenant is dowable, as on the death of her husband there could be no survivor, who would be in by a title paramount to her claim of dower.

The demandant must therefore recover, unless the second objection should prevail. It certainly is law that where the husband is seised but for an instant, of this seisin his wife shall not be endowed. The seisin for an instant is where the husband, by the same act, or by the same conveyance, by which he acquires the seisin, parts with it. Thus, if tenant for life, make a feoffment in fee, his wife shall not be endowed; for, by making the same feoffment which passed the fee, he acquired a fee: 2 Cro. 615. And if a joint tenant make a feoffment, his wife shall not be endowed, for by the feoffment he was seised of a several estate but for an instant, which he acquired and parted with by the feoffment: *Id.* So, if a feoffment be to B. and his heirs to the use of C. and his heirs, the wife of B. shall not be endowed, for he was but an instrument; and the same feoffment which gave him the seisin, by the statute of uses, transferred it to C. Nor shall the wife of the conusee of the fine be endowed, when by the same fine the estate is rendered back to the conusor: 2 Co. 77a.

Let us now compare the present conveyances with these principles; for the previous agreement may be laid out of the case. If the deeds pursue it, it is useless; and if they do not, we must be governed wholly by the construction of the deeds. The mortgage back to the father, from the terms of it, is of even date with the conveyance from him. They are, therefore, to be considered as parts of the same contract, and as taking effect at the same instant. The conveyance from the father took effect when he delivered his deed; the mortgage back took effect when the mortgage deed was delivered; but both being of even date, were delivered at the same time. The mortgagors were, therefore, seised but for an instant, taking an absolute estate in fee, and instantaneously rendering back, a conditional estate in fee. These two instruments must, therefore, be considered as parts of one and the same contract between the parties; in the same manner as a deed of defeasance forms with the deed to be defeated, but one contract, although engrossed on several sheets; and no interval of time intervened between the taking and the rendering back of the fee.

But if the husband continued seised for any portion of time, however short, his wife would have been entitled to dower; as if the

conveyance back had been made posterior in point of time, or by a deed distinct from the first grant. There is the case of *Nash v. Preston*, reported in *Cro. Car.* 190, illustrating and supporting these principles. In that case I. S. seised in fee, bargains and sells the land to the husband for one hundred and twenty pounds, in consideration that the bargainee shall redemise it to the bargainor and his wife for twenty years, rendering a nominal rent, with a condition that if the bargainor, at the end of twenty years, paid back the one hundred and twenty pounds, the bargain and sale should be void. The bargainee accordingly redemised it, and dies. His wife shall have dower, because the land, by the bargain and sale, was vested in the husband. But it would have been otherwise if the land was in, and was out of the husband by one act. In the case at bar, the execution of the two deeds, they being of even date, was done at the same instant, and constitutes but one act.

The demandant, therefore, cannot support her claim, as her husband was never so seised as to entitle her to dower. According to the terms of the agreement, submitting the case to the court, the demandant must become nonsuit.

STEVENS v. SMITH.

4 *J. J. Marshall*, 64; 20 *Am. Dec.* 205. (1830)

UNDERWOOD, J. In 1805, Joseph K. Glenn, then unmarried, executed an obligation to Smith for the conveyance of sixty acres of land. Afterwards, to wit, in November, 1807, Glenn conveyed the land to Smith. Previous to the date of the conveyance, and subsequent to the obligation, Glenn married Mary, the wife, at present, of Stevens, she having, since the death of Glenn, married Stevens. Said Mary did not unite with her former husband, Glenn, in the execution of the deed to Smith. Since Glenn's death, Stevens and wife have filed their bill against Smith, praying for an assignment of dower in the sixty acres of land, and the only question presented by the record is the validity of Mrs. Stevens' claim to dower, in virtue of her former marriage with Glenn. By the common law, three things were necessary to vest in a woman a right of dower: 1. That her husband, at some time during the existence of the coverture, should have been seised of the lands in which dower is claimed, either

in fee-simple or fee-tail; 2. Marriage; and, 3. The death of the husband leaving the wife. There are, nevertheless, exceptions to these general propositions. A woman, for example, shall not be endowed both of land given in exchange, and of the land taken in exchange, and yet the husband was seised of both: 1 Inst. 31, b.

According to the facts in the present case, Glenn had an actual seisin in the land conveyed to Smith, prior to his marriage with Mrs. Stevens. The possession, in fact, of the sixty acres was transferred to Smith before the marriage, and never, during the existence of the coverture, did Glenn have actual possession of the sixty acres. Before the conveyance executed, in 1807, and subsequent to the execution of the bond for a title, in 1805, Glenn was legally seised in fee of the land, and while thus seised the marriage took place; but notwithstanding such seisin, it is manifest that he had no beneficial possession. By the contract with Smith, and the delivery of the possession to him for his use and benefit, Glenn divested himself for the use and enjoyment of the land, and transferred it to Smith. According to Coke, 1 Inst. 31, a woman shall be endowed where the husband is seised in law, as well as where the seisin is in deed, or a natural seisin, or, in other words, where the husband is in actual possession, holding a fee-simple title. But a man cannot become tenant by the courtesy, unless the wife be seised in deed. It is not material to dwell on the reason for the difference. As, then, Glenn was seised in law of an estate in fee simple, in the sixty acres, when the marriage existed, it conclusively follows that Mrs. Stevens is entitled to dower therein, unless the contract between Glenn and Smith, of 1805, and the delivery of the actual possession, of the land to the latter, so operate as to destroy the right of Mrs. Stevens.

In the case of Winn, etc., v. Elliot's widow, etc., Hardin, 482. it is said "that before the statute of 27 Henry VIII., commonly called the statute of uses, the wife of the feoffee to uses was not to be endowed of the estate so held in confidence to the use of another, because the husband had no beneficial interest; and the wife of the *cestui que use* was not to be endowed, because there was no trust or benefit declared for her in the original grant." "The effect of the statute of uses was to convert the interest of the *cestui que use* into a legal instead of an equitable ownership; and all the legal consequences of estate, dower among the rest, at once attached." Thus the marital rights of women, by the operation of this statute of Henry VIII., were so enlarged as to entitle them to dower in estates conveyed for uses. How this statute was evaded by the scruples of the common law

judges, notwithstanding the comprehensive terms used, and how trusts followed uses, are matters explained by Blackstone in his vol. 2, p. 335.

The doctrine in relation to dower in trust estates, at the common law, is well settled by numerous adjudications. A woman could not be endowed of a trust estate. See the English authorities in note 183, on 1 Inst.; see, also, the case of Claiborne v. Henderson, 3 Hen. & Munf. 322, and likewise the case of Bailey and wife v. Duncan's Representatives, etc., 4 Mon. 261, as well as that of Winn, etc., v. Elliot's Widow, already referred to. To impart to trust estates a dowable quality was an object of the Virginia legislature as early as 1785. In 1796 our legislature re-enacted the provisions of our parent state on this subject: See 14th section of the act, 1 Dig. 315.

Thus the provisions of these statutes have changed the law of dower, in respect to trust estates. But it is important to notice, that these statutes do not give the wife of the trustee a right of dower in the trust estate. It is the husband or wife of the *cestui que use*, or *cestui que trust* alone, who by virtue of the statute shall have and hold courtesy or dower in the use or trust estate. These acts of Virginia and Kentucky place the wives of *cestui que trust* upon the same footing, in respect to dower, which the statute of 27 Henry VIII. effected in relation to uses. In the case of Winn, etc., v. Elliot's Widow, etc., the court left the question open, whether a wife was entitled to dower in an inchoate estate, not reduced to a legal one during the coverture. This question fairly presented itself in the case of Bailey and Wife v. Duncan's Representatives, and was settled in favor of the wife's right.

The court used this language: "In deciding upon the question under consideration, the main and only inquiry for the court is, to ascertain whether or not it was intended by the makers of the act (to wit, that of 1797) to authorize a wife to recover dower in lands to which the husband had, at his death, an indisputable right in equity to a conveyance of the fee-simple estate, though the right be derived under an executory contract for the title, and not resulting from an use or trust, expressly declared by the deed. With respect to trusts of the latter sort, the provisions of the act are too explicit in favor of the wife's right to admit a difference of opinion; and if we advert, as we should do, to the old law as it stood at the passage of the act, the mischief which must have actuated the legislature in making the change, and the remedy which the act has provided, we apprehend but little doubt will be entertained as to the propriety of giving such construction to the act as will embrace all trusts, whether expressly

declared by deed, or resulting from executory contracts by construction of courts of equity."

An application of this doctrine would give the wife of Smith, if he had one, and if he had died between the date of his title bond, in 1805, and his deed in 1807, a right to dower in the sixty acres of land. Glenn's obligation was for an unconditional conveyance of the title. He was bound by the terms of the obligation to make the conveyance presently. In equity, therefore, he was the trustee, and the mere title holder for Smith's use. Smith's wife was entitled to dower, under the statute, in this trust estate, resulting from the executory contract. The same principles which convert the estate into a trust, so that the statute operates upon it in favor of Smith's wife, brings the case within the influence of those doctrines of the law which exclude the right of the trustee's wife to demand dower. Here, then, before Mrs. Stevens' intermarriage with Glenn, he had, by a contract entered into upon ample and valuable consideration, become in equity the trustee and legal title holder for Smith's use, and thereby placed himself in a situation in which the property, so held by him in trust, could not thereafter be incumbered by the dower claim of any woman he might marry. For, as already remarked, the law excluding the dower claims of the wives of mere trustees was not altered by the statute, so as to better their condition. The wives of *cestui que* trust alone were benefited by the change.

It is worthy of remark that the equity of Smith, founded upon an executory contract, originated before Mrs. Stevens married Glenn. From the face of Glenn's bond for a title, he ought to have made the conveyance before his marriage. Equity often considers that as done which ought to have been done. Glenn could have had no pretext for withholding the title, unless it might have been to secure the payment of the purchase money. It does not appear that any lien on the land for that purpose existed. If it did appear, such a lien could not be regarded as a beneficial interest, coupled with the title so as to give Mrs. Stevens a right of dower. It would be no more than the attitude of a mortgagee who holds the title to secure his debt, without conferring on his wife a right to dower. It is laid down by Coke, 1 Inst. 316, that "a woman shall not be endowed by a seisin for an instant." This court, in the case of *Tevis v. Steele*, 4 Mon. 340, considering this doctrine with great propriety, in our opinion, lay more stress upon the nature of the interest than upon the duration of the seisin.

Looking to the true nature of the interests of the respective parties

in the present case, under all the circumstances, it seems to be in conformity to the principles of equity and the adjudged cases, to regard the beneficial seisin, which once existed in Glenn, as avoided by his executory contract with Smith, and the estate invested into a trust, of which Glenn's wife, now Mrs. Stevens, can not be endowed, but in which Smith's wife, under the statute, might claim dower. Had Mrs. Stevens been the wife of Glenn at any time when he was beneficially seised, the law and the justice of the case would have been for her. As the facts are, the decree is affirmed with costs.

McCABE v. BELLOWS.

7 Gray, 148; 66 Am. Dec. 467. (1856)

THOMAS, J. * * * It is quite plain that the plaintiff cannot redeem the estate except upon an offer to pay the whole amount due on the mortgage: Gibson v. Crehore, 5 Pick. 151-153; Eaton v. Simonds, 14 Id. 98; Brown v. Lapham, 3 Cush. 554. Having joined in the mortgage to secure the payment of the mortgage debt, she has barred herself of her right of dower, as against the mortgagee, and so far as is necessary for the payment of his mortgage. It is only when that debt is paid, or when the mortgagee does not object, that her dower can be assigned: Henry's Case, 4 Id. 257. She is entitled to dower in the mortgaged premises as against every person except the mortgagee and those claiming under him. If any person claiming under her husband has redeemed, she may repay her proportion of the amount so paid, and have her dower of the whole estate; or she may have her dower according to the value of the estate, after deducting the amount paid for the redemption: R. S., c. 60, sec. 2; Newton v. Cook, 4 Gray, 46. But as against the mortgagee she can only have dower by redeeming the mortgage. * * *

MANDEL v. McCLAVE.

46 *Ohio St.* 407; 15 *Am. St. Rep.* 627; 22 *N. E.* 290; 5 *L. R. A.* 519.
(1889)

Action to enforce a judgment. The plaintiff in error excepted in one particular to the conclusions of law drawn by the court of common pleas upon the trial, and carried the cause to the circuit court, which affirmed the judgment of the lower court. She thereupon instituted this proceeding to reverse both judgments. Mrs. Mandel joined with her husband in two mortgages, on his real estate to secure his debts. The husband subsequently became indebted to John McClave and William H. Lowe, separately, each of whom reduced his debt to judgment. McClave then brought suit to enforce his judgment, making Lowe, the two mortgagees, and Mandel and wife parties. A decree was rendered in this action giving each lien-holder a judgment for the sale of the premises. A sale was made on an order caused to be issued by McClave. The value of the wife's contingent right of dower was found to be \$1,203.06, if she was entitled to be endowed of the whole estate, but only \$278.95, if she was entitled to be endowed of the equity of redemption only. Lowe's claim was \$1,774.70, and McClave's \$1,730.39. The court below held that Mrs. Mandel was only entitled to be endowed of the equity of redemption. Other facts are stated in the opinion.

BRADBURY, J. The husband of plaintiff in error is still living, and therefore, when his lands were sold by the sheriff and the proceeds thereof distributed by the order of the court of common pleas, she had only a contingent right of dower therein. This right, the court found, was sold and passed to the purchaser at the sheriff's sale. To this finding she took no exception, being apparently satisfied to have her rights determined by the order of distribution.

The proceeds of the sale were \$17,000, of which \$13,663.37 were consumed in paying the taxes, costs, and mortgage liens, about which no contention arose; there then remained a balance of \$3,930.63 to be distributed to the wife and the two judgment creditors. Of this sum she claimed \$500, in lieu of a homestead; on this claim the court found in her favor, and the amount was paid to her. The defendant McClave excepted to this finding and order of the court, but did not, so far as the record discloses, bring the question to the attention of the circuit court, nor has he presented the matter to this court for review. He will therefore be regarded as acquiescing in the action of the

court below respecting it, and the question will not be further noticed here.

The only ruling of the courts below that we are asked to review is that which limited the right of the wife to dower in the proceeds of the equity of redemption. As the fund is large enough to pay in full Lowe's claim, notwithstanding the wife's claim may be allowed to its full extent, it follows that he is not interested in the question; but as the claim of the wife, to the extent it may be allowed, will be paid out of funds that would otherwise be distributed to McClave, the contention is confined to them.

McClave concedes that the wife is entitled to be endowed of the proceeds of the equity of redemption, while she claims the right to be endowed of the entire proceeds of the land, to be paid, however, out of the proceeds of the equity of redemption. He contends that her release of dower to the mortgagees inures to his benefit; that it was an absolute release of that right in the premises to the extent of the mortgage debt, and that in satisfying the mortgage debts out of the proceeds, her interest in so much of the fund as was required for that purpose should be applied equally with that of her husband.

Her contention, upon the other hand, is, that her contingent interest in the whole premises was pledged, together with the whole interest of the husband therein, for the payment of his debt; that the debt being his, it was primarily chargeable upon his interest, and that his entire interest in the thing pledged should be applied to pay the debt before resorting to her interest therein.

This precise question is new in this state, and we are to solve it by applying to the facts such settled legal and equitable principles as in their nature are applicable and pertinent thereto.

If the contingent right of a wife to dower in her husband's real estate is recognized by the laws of the state as property, and if her release of it by joining with her husband, in a mortgage to secure his debt is not a technical bar, but, instead, only inures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying, in favor of the wife, the equitable rule that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity to prevent the application of this equitable rule; they have no claim that property, which, as between husband and wife, belongs to the wife, shall be taken without her consent, and applied to pay their debts against the husband. The first question,

therefore, to be determined is, whether, in this state, the contingent right of a wife to dower in her husband's real estate is property having a substantial and ascertainable value.

To reconcile all the cases, even in Ohio, on the subject of the nature of the wife's contingent right of dower, or respecting the effect of her release of it by joining with her husband in a conveyance of the real estate to which it attaches, would be impossible. In the cases upon the subject in this, or in other states, or in England, almost every shade of opinion can be found. Nowhere is this wide divergence of judicial opinion more clearly set forth than in the dissenting opinion of Judge Johnson in *Black v. Kuhlman*, 30 Ohio St. 196, where that able judge reviews the cases in support of the older and more technical rules on the subject. The court, however, took the more liberal, and as we think the more reasonable, view of the question. And there seems to be clearly discernible in the Ohio cases a growing tendency to disregard the older and more technical rules of the earlier cases; and this is especially true of the later cases in this state.

It is an incontestable fact that, in the estimation of the business world, the contingent right of the wife, during the husband's life, to dower in his real estate at his death has a positive and substantial value, and no acuteness of artificial reasoning, founded on technical rules of law, can persuade a prospective purchaser to the contrary.

This practical view of the matter has been adopted by the later Ohio cases: *Ketchum v. Shaw*, 28 Ohio, St. 503; *Black v. Kuhlman*, 30 Id. 196; *Unger v. Leiter*, 32 Id. 210; *Kling v. Ballentine*, 40 Id. 391.

* * *

What then, is the effect of her release of this right by joining with her husband in a mortgage to secure his debt? Does it inure to the benefit of other persons who are strangers to the deed, or is its operation restricted to the grantee and his privies? This latter view we think the more reasonable; it accords more nearly with the probable intention of the parties to the instrument; there is no ground to assert that the mortgagee was contracting for the benefit of any one but himself; there is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that particular debt; nor is there, in the terms of the instrument itself, any language importing such intent. If, therefore, the instrument has any such effect, it is the result of some technical rule of law giving to the deed of the parties in this respect

an operation never so far as can be gathered from the words of the parties, within their contemplation. Whatever the state of the law may be elsewhere, we think no such technical rule now prevails in Ohio; some of the earlier cases seem to give it support, but the tendency of the later cases is to limit the operation of the release to the mortgagee and his privies.

In *Ketchum v. Shaw*, 28 Ohio St. 503, a case involving the right of a wife to dower, we find this language used by Judge Wright (506): "She joined in the conveyance of the land, releasing her dower, not absolutely, but only so far forth as it was necessary to pay the mortgage debt. That done, everything else remains to her."

In *Kitzmiller v. Van Renselaer*, 10 Ohio St. 63, it appeared that, after the recovery of a judgment against the husband, he sold his real estate to a third person, the wife joining in the deed by a release of dower. Afterwards, the land was sold under an execution issued on the judgment, whereupon the purchaser ejected the grantee under the deed of the husband and wife. The husband then died, and the wife brought suit for dower against the purchaser at the judicial sale. He sought to defeat her claim for dower by setting up her release to the grantee of the husband; but the court held that the release did not inure to his benefit. On page 64, this language is found: "He cannot make the release available to him as a grant, for he was not a party to the grant; nor is he in privity with the grantees. The release cannot operate in behalf of the defendant below by way of estoppel; for a stranger cannot be bound by nor take advantage of an estoppel." Here the wife had released her right of dower to the grantee of her husband absolutely; no right of redemption reserved as in a mortgage, yet the court held that the release is wholly inoperative except in favor of the grantee. Cases can be found in Ohio that conflict with this view; but this irreconcilable conflict leaves us to adopt that view which accords most clearly with that presumed intention of the parties which arises from the nature of the transaction, and a rational construction of the language they have used.

It being established that the contingent right of the wife to dower in her husband's real estate is property, the value of which can be ascertained by the aid of fixed principles, and that her release of it by joining with her husband in a mortgage to secure his debt does not, by reason of any technical rule of law, inure to the benefit of a stranger to the instrument, either by way of grant or estoppel, it remains for the court to determine to what extent equity will protect this right after the real estate has been converted into money, and the fund is

before the court for distribution. The undoubted rule is, that so long as the real estate remains in the husband or his grantee, equity will not interfere in her favor during the life of the husband, but that she must await her husband's death, when her inchoate right will become consummate. When, however, the estate has been sold at a judicial sale, free from her contingent right of dower, whatever right she may have is in the proceeds of the sale, and must be enforced if at all, by a distribution of the fund.

If the plaintiff in error had been seised of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other, he would be the principal, and she his surety. We think the same principle should be applied to her contingent right of dower. It is property; its value can be ascertained. More than this, it is a favorite of the law: See authorities collected in 5 Am. & Eng. Ency. of Law, 885, note. It is a provision for her support, and when she pledges it for her husband's debt, by joining in a mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has first been exhausted. She is a purchaser. The inception of her right was earlier than that of the creditors; it began with the marriage and seisin of the husband; theirs began when the debt was contracted, but only became a lien from the recovery of the judgment against the husband. This favorite of the law is entitled to protection equal to that accorded to her other property. * * *

Note: In some states a contrary view to this has been adopted, on the theory that the wife's joinder in the mortgage for the purpose of releasing her inchoate right of dower, is not the equivalent to a mortgage by her of her separate property.

Bank of Commerce v. Owens, 31 Md. 320; Burnet v. Burnet, 46 N. J. Eq. 144.

TALTY v. TALTY et al.

40 App. D. C. 587. (1913)

MR. CHIEF JUSTICE SHEPARD delivered the opinion of the Court:

This is an appeal from an order denying a claim of dower in an award made in a condemnation proceeding.

John E. Talty died January 25, 1892, leaving a widow, Elizabeth R. Talty, and three children, Robert C., Albert W., and Richard C. R. Talty. John E. Talty left a will devising and bequeathing to his widow his entire estate for life subject to some small charges, and providing: "At the death of my said wife my said estate shall be divided equally between my children, Robert C. Talty, Albert W. Talty, and Richard C. R. Talty, share and share alike." Part of the estate consisted of parts of squares 634 and 685, in the city of Washington, proceedings to condemn which to public use were instituted on behalf of the United States in October, 1911. On the hearing before the Commissioners appointed to appraise the value of the land, it was agreed by all parties at interest that the award should be made in one sum, leaving the matter of division between the parties claiming to the final determination of the court. The award in gross was \$63,015. On motion to determine the interests of the several claimants the following facts, in addition to those above stated, were agreed upon: The life tenant is alive. Albert W. Talty died intestate after 1902, leaving a widow, who still lives, but no child. Richard C. R. Talty died intestate December 25, 1908, leaving a widow Virginia Talty, to whom he was married in 1906. He left no children. The widow survives and claims a dower interest in her husband's interest in the land. She is between 35 and 40 years of age, and the life tenant is between 67 and 72 years of age. Upon hearing, the court entered an order denying that the widow, Virginia Talty, is entitled to dower in any portion of the award, and ordering payment of the same to said Elizabeth R. Talty and Robert C. Talty, by warrant drawn to their joint order. By the rule of the common law a widow is not entitled to dower in lands to which the husband has a remainder in fee if the remainderman predecease the life tenant, which is the case here, for the reason that the remainderman had neither seisin in deed nor in law. Seisin in deed is the actual possession; seisin in law is the right to immediate possession; neither of which the remainderman has during the life of the tenant.

This is conceded by the appellant, but it is contended on her behalf

that this rule of the common law has been changed by the Code.

The first section relied on is 1158, which is contained in Chapter XXXIII treating of husband and wife. It reads as follows: "Dower—A widow shall be entitled to dower in lands held by equitable as well as legal title in the husband at any time during the coverture, whether held by him at the time of his death or not, but such right of dower shall not operate to the prejudice of any claim for the purchase money of such lands or other lien on the same."

At common law dower was limited to land whereof the husband had the legal title. To remedy what was considered a defect of the common law as applied to modern conditions, the section expressly extended dower to lands held by equitable title also.

The contention that the effect of this section was also to extend dower to remainders, where there is neither possession nor right of possession in the remainderman, and thus work a further change in the common law, is founded on the meaning ascribed to the word "held," therein used. The argument is that a remainder being an estate of inheritance, the remainderman, held the legal title thereto, though not entitled to the actual possession at the time of his death. Without following this argument, which is ably presented, in detail, we think it sufficient to say that we are not impressed with the soundness of its conclusion. Considering the plainly expressed intention of the section we would not be justified in giving the word relied on—not an unusual or inappropriate one for that purpose—a construction that would accomplish the additional purpose. It is more reasonable to suppose that had the framers of the section intended a further change of the common law, this intention would not have been left to rest upon this slender foundation, but would have been more plainly expressed.

Sections 1029 and 1030 are also relied on by the appellant as entitling the widow to dower in an estate in remainder. Section 1029 provides that no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate estate, nor by any destruction of such precedent estate, by disseizin, forfeiture, surrender, merger, or otherwise, etc., and section 1030 provides that: "Expectant estates shall be descendible, devisable, and alienable in the same manner as estates in possession."

Section 1029 relates to expectant estates in their proper legal sense. It is not applicable to vested remainders for those were never subject to be defeated by alienation or other act of the owner of the intermediate or precedent estate. Nor did such estates require the aid of

section 1030 to become "descendible, devisable, or alienable in the same manner as estates in possession." See *Hayes v. Huddleson*, 40 App. D. C. 183-195. But without regard to this view we can not construe the words "Alienable in the same manner as estates in possession," as meaning "alienable subject to the wife's dower, unless she joined in the conveyance," according to the contention of the appellant. Dower is not an estate until assigned, but a chose in action. The foregoing sections are found in Chapter XXIV, sub-chapter 1, of the Code, relating to estates, in which dower is not once mentioned. As was said in discussing the construction of section 1158, it ought not to be supposed that it was intended by the use of terms appropriate to the subject-matter expressly provided for, to effect a change in the rules of the common law relating to a different subject-matter. The construction contended for is a strained one, the adoption of which would set a dangerous precedent in the construction of our statutes.

We are of the opinion that the decree is right, and it is affirmed with costs.

GROVE v. TODD.

41 Md. 633; 20 Am. Rep. 77. (1875)

ALVEY, J. * * * The deed purports to convey a farm of about 1318 acres of land in Frederick county, to Benjamin H. Todd and Jesse E. Todd, children of Jesse Todd, deceased, the illegitimate son of Benjamin Todd, the grantor. The consideration expressed in the deed was the love and affection which the grantor, Benjamin Todd, bore to the grantees, whom he called his grand-children. The wife Ruth bore no blood relation whatever to these children. The deed, while it professes to have been executed and acknowledged in Frederick county, before a justice of the peace of that county, was in fact executed and acknowledged in Carroll county, where the grantor and his wife at the time resided, before a justice of the peace of Frederick county. Benjamin Todd, the grantor, died intestate in December, 1866, and his widow, one of the appellants, intermarried with Samuel Grove, the other appellant, some time in the summer of 1867. The bill is filed by the appellants to have the deed declared a nullity, and for the assignment of dower in the land attempted to be conveyed.

* * *

That the deed is wholly inoperative and void, as against the wife, without the aid of the act of the legislature of 1867, ch. 160, has not been denied, or in any manner controverted; but it is insisted by the appellees that the act just referred to has effectually cured and made valid the otherwise void acknowledgment, and that the deed, by means of the curative act, operates to extinguish all right of dower in the land mentioned.

The language of the act relied on is certainly broad and comprehensive. It declares: "That all deeds executed and acknowledged by the grantors, since the 1st day of November, 1864, in the county in this State in which the grantors then resided, before any other justice of the peace of any other county in this State, duly commissioned and qualified, shall be as valid to all intents and purposes as if acknowledged in the county where the lands in whole or in part are situate, before a justice of said county, or as if acknowledged before a justice of the peace of the county in which the grantors resided." Before the passage of this act, Benjamin Todd had died, and by that event the widow's right to dower in the lands mentioned in the deed had become vested and absolute; and she is now entitled to have that dower assigned, unless her right is barred by the deed of the 29th of November, 1866.

By the common law, a *feme covert* could not release or convey her inchoate right of dower in her husband's lands by deed, but only by fine or common recovery. In this State, however, she is enabled by statute to release her dower either by joining in the deed of her husband, or by separate deed, accompanied in either case by proper acknowledgment, as the law directs. Code, art. 55, 11. This acknowledgment is required to be made, if within the State, either before some judge or justice for the county or city within which the real estate, or some part of it, lies, or some judge or justice for the county or city in which the grantor may be at the time of acknowledgment; and if before a justice of the peace of a county or city other than that in which the land lies, the official character of such justice is required to be certified by the clerk of the court; and without the acknowledgment thus required, it is declared that no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect. Code, art. 24, 1, 2, 3. The acknowledgment is therefore essential to the validity of the deed, as a legal conveyance, and not only so, but it must be before the proper officer; for if made before a justice of the peace out of the county or city for which he was appointed, the acknowledgment is as

inoperative and void, as if the person taking it was wholly without official character. *Byer v. Etnyre & Besore*, 2 Gill, 151. Whatever may be the effect and operation of the deed, without proper acknowledgment, as against the husband, it is certain that the wife could only be divested of her estate by proper and legal acknowledgment, and a deed not so acknowledged, is wholly inoperative as to her, and is to be treated as if she had not been a party to it. *Johns v. Reardon*, 11 Md. 465; *Steffey v. Steffey*, 19 id. 5. The deed before us, being without acknowledgment, was utterly null and void as against the wife, both at law and in equity and she was under no obligation, and could not be compelled to rectify it, so as to give it operation and effect. *Gebb v. Rose*, 40 Md. 387; *Drury v. Foster*, 2 Wall, 24.

Such then being the state and condition of the widow's title to dower in the lands mentioned in the deed, at the time of the passage of the act of 1867, ch. 160, was it within the constitutional power of the legislature, by retroactive legislation, to give force and validity to the deed, as if properly acknowledged, and thus divest a vested estate?

That the legislature may, in proper cases, by retroactive legislation, cure or confirm conveyances, or other proceedings, defectively acknowledged or executed, we entertain no doubt. As authority for the exercise of such power, we have long usage and many precedents. Such legislation is sustainable, because it is supposed not to operate upon the deed or contract, by changing it, but upon the mode of proof only. *Journey v. Gibson*, 56 Penn. St. 57; *Shonk v. Brown*, 61 id. 321. And in this case we are of opinion that the act of 1867, ch. 160, has operated to cure and make effectual the deed before us, as against the husband and his heirs. The deed was a good grant at the common law, as against the husband, and he executed it upon a strong moral consideration, apart from the fact that it was designed to carry out a long settled and determined purpose of his so to dispose of the estate. But not so as to the wife. As to her, she being without capacity to make a deed or contract, except in a particular mode, not complied with in this case, the deed by which she is now sought to be barred was no more than a blank piece of paper; and as when vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without inflicting a wrong upon others (9 Gill, 309), we think the right of the appellant in this case is of that character. She has a right to insist, according to the Declaration of Rights, art. 23, that she shall not be disseized of her freehold, liberties or privileges, or deprived of her property, otherwise than by the judg-

ment of her peers, or by the law of the land; or, as these latter terms are defined, by due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. 2 Kent's Com. 13; *The Regents v. Williams*, 9 Gill & J. 412; *Wright v. Wright*, 2 Md. 452; *Westervelt v. Gregg*, 12 N. Y. 209; *Reese v. City of Watertown*, 19 Wall. 122. The deed being utterly void and without effect as to her estate, if she is now divested of her right of dower, it is by force of the statute and not of the deed; the statute operating through the form of the otherwise void deed to transfer the estate. To concede to the legislature the power, by retroactive legislation, adopted without the consent of the party to be affected, to accomplish such a result, is at once to concede to it the power to divest the rights of property and transfer them, without the forms of law, upon any notion of right or justice that the legislature may think proper to adopt; a concession that can never be made in a government where the rights of property do not depend upon the mere will of the legislature, and which professes to maintain a regular system of laws for the protection of the rights of property of its citizens.

* * *

MALLONEY v. HORAN.

49 N. Y. III; 10 Am. Rep. 336. (1872)

FOLGER, J. The plaintiff showed that she was the wife of Patrick Malloney in his lifetime; that, during coverture, he was seized in fee of the premises, in which she now demands dower; and that before the commencement of her action he departed this life. She thus makes a prima facie case for a judgment in her favor.

The defendant relies upon four grounds to defeat the case made by her. * * *

The third ground taken by the defendant is, that, by joining with her husband in the conveyance to Malloney, the plaintiff released all her right of dower in the premises. And though it is suggested in answer thereto that the deed, having been declared void as against the creditors of the husband, and adjudged to be canceled of record, thereby the title is restored to the husband, and the right of dower may again arise; it is replied to this that a deed, though fraudulent as against third persons, and subject to be set aside as void therefor, is

yet good and valid as between the fraudulent parties to it, and that the fee of the lands has passed by it, so that the grantor cannot call it back. And if the grantor, the husband, cannot recall the fee, and it has passed from him, then, as it is claimed, has the wife, by joining in the conveyance, effectually and forever released her right of dower. If it should be conceded that the wife, by such act, has effectually released her right of dower to the fraudulent grantee and his assigns, it is not yet determined that she is debarred of her right, as against one claiming the premises from a source other than him or them, and indeed in hostility to him and to them. For what is the effect and operation of a release by a wife of her inchoate right of dower? She cannot, nor can a widow, until admeasurement, convey or assign her dower. The joining with the husband in his conveyance is then but a release by the wife of a contingent future right, and operates against her but by way of estoppel. *Tompkins v. Fonda*, 4 Paige, 448. And it is said that she cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person. *Carson v. Murray*, 3 Paige, 483. The release must, at all events, accompany or be incident to the conveyance of another. And the right of dower again attaches, upon a reconveyance of the real estate to the husband, or upon his becoming, in any other manner, vested in his own right, with the title thereto, *Id.* And inasmuch as the release of dower, to be operative, must be in conjunction with a conveyance or other instrument which transfers a title to the real estate, it follows that if the conveyance or instrument is void, or ceases, for any reason, to operate, and no title has passed, or none remained, the release of dower does not, after that, operate against the wife, and she is again clothed with the right which she had released. Such is the familiar case of a wife joining with her husband in the execution of a mortgage, and thereby releasing her right of dower. On the satisfaction of the mortgage her right is restored. And so when a deed has been executed by the husband with full covenants, in which the wife has joined, releasing her dower, and afterward the grantee has sued for a breach of the covenants, and has recovered full damages, it has been held, the husband dying, that the widow has a right of dower in the premises. *Stinson v. Sumner*, 9 Mass. 143. The ground upon which that decision is placed comports with reason. It is, that the judgment in an action on the covenants in a deed goes upon the ground that nothing has passed by it to the grantee. If nothing has passed by it to the grantee, then the grantor has retained all that which he had when he executed the deed. And

the wife of the grantor retains, with him, all that she had. The principle which governs is this: The release of an inchoate right of dower which a married woman makes by joining in a conveyance with her husband, operates against her only by estoppel. An estoppel must be reciprocal, and binds only in favor of those who are privy thereto. A release of dower can be availed of then, only by one who claims under the very title which was created by the conveyance with which the release is joined. A release to a stranger to that title, does not extinguish the right of dower. *Harriman v. Gray*, 49 Maine, 557. It shows no privity of estate or connection of any kind between the doweress and the tenant. *Pixley v. Bennett*, 11 Mass. 298. But when a creditor of the husband pursues him to judgment and attacks as fraudulent and sets aside as void the deed from him, joining in which the wife has released her right of dower, he does not connect himself with the title which that deed has created, and with which the release of dower is connected. He sets up the title of the husband as it existed before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release or in privity with it, he may not set it up in bar of dower. See *Wyman v. Fox*, 59 Maine, 100; *Robinson v. Bates*, 3 Metc. 40.

We are of the opinion that the defendant cannot successfully stand upon this ground. * * *

WHITE v. WHITE.

16 N. J. Law 202; 31 Am. Dec. 232. (1837)

FORD, J. * * * The fourth plea avers that the premises consist of a farm, devised to the said Richard and Peter, equally to be divided between them, that the premises were in the sole possession of Peter, on a certain day, when, by a writing under her hand, the demandant released her claim of dower in said farm, on the part of the said Richard; by means whereof Richard's portion of the said farm, then in the occupation of Peter, "and the said farm" were released and discharged from her claim of dower. The demandant demurs to this for duplicity, in that it first avers a release of dower in Richard's moiety. and secondly, a release of it in the whole farm. But the allegation of duplicity is certainly a mistake; the plea presents only a single traversable fact, namely, a release of dower in Richard's moiety; the

subsequent *virtute cujus*, only shows the operation and effect of it, in law, which can not be traversed or put in issue to the country. Neither is the plea argumentative, as where one fact is stated, that another fact may be inferred from it. It is admissible to state a fact together with the operation in law. But there is a substantial objection to it, that a release of dower is pleaded without any profert of the deed. Moreover a release of dower in one moiety of a farm, will not operate in law, as a release of it in the other moiety; nor does a release of it to one tenant in common for his share, operate in law as a release of it to another tenant in common who has a different share. It has no analogy to releasing one of many joint and several obligors, where there exists but one debt, which becomes by a release to one, extinguished, as much as if he had paid it in money. Judgment must therefore be rendered, that this plea is insufficient to bar the action.

HERBERT AND OTHERS v. WREN AND WIFE, AND OTHERS.

7 *Cranch* (U. S.) 370; 3 *L. Ed.* 374. (1813)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The material questions in the cause are: 1. Has a court of equity jurisdiction in the case? 2. Is the plaintiff, Susanna, entitled to dower? 3. If these points be in her favour, what decree ought the court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favour of this jurisdiction: one of which is, that partitions are made and accounts are taken in chancery in a manner highly favourable to the great purposes of justice. In this case dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of assignment of dower in the part of which Lewis Hipkins died seised.

An additional reason, and a conclusive one in favour of the jurisdiction of a court of equity, is this: the lands are in possession of a purchaser, who has not yet paid the purchase money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed,

to affirm the sales, and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a court of chancery.

2. It is perfectly clear that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower for several reasons, of which it will be necessary to mention only two.

1. It is not expressed to be made in lieu of dower. 2. It is not averred that she has accepted the provision and still enjoys it.

3. It remains to inquire what decree the court ought to make in the case. The first question to be discussed is this: is the plaintiff, Susanna, entitled both to dower and to the provision made for her in the will of her late husband?

The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which she has been permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity not to permit the same person to hold under and against a will. If therefore it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold v. Kempstead and wife*, of *Villarael v. Lord Galway*, and of *Jones v. Collier and others*, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife compared with the whole estate is not in proof; but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund provided for the maintenance and education of his five children, is the rent of one hundred and forty pounds per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill, and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained.

The clause, too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the encumbrance of dower.

Upon this view of the will it is the opinion of the majority of the court, that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court that she has accepted the provisions of the will, nor that she still enjoys it. Indeed there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower?

It is unnecessary to decide whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case the plaintiff was in actual enjoyment of dower. She received one-third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate; and when afterwards the land was sold under a decree of a court, P. R. Fendall, was one of the executors who made the sale, and was himself in effect the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of one hundred and forty pounds per annum for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower, and hold any portion of the particular estate devised to her, or of the profits on that estate. An account therefore must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase money, might legally be made. This must be considered as a compromise between the plaintiffs and the defendant Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that, instead of a sum in gross, one-third of the purchase money shall be set apart, and the interest thereof, paid annually to the tenant in dower during her life.

If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate, but this court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion that there is error in the decree of the cir-

cuit court, in not requiring the plaintiff Susanna to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be reversed, and the cause remanded for further proceedings, in conformity with the following decree: Decree omitted.

DAVISON & CO. v. WHITTLESEY et al.

1 *McArthur* (D. C.) 163. (1873)

The bill was filed by a judgment-creditor, setting forth the judgment at law against the defendant, Virginia Whittlesey, for the sum of \$1,545.58, and that execution thereon had been returned unsatisfied. The bill also alleges that one Comfort S. Whittlesey, husband of the said Virginia, departed this life intestate in 1864, seized in fee-simple of a lot of ground in said District which is described; and that his widow, the said Virginia, is entitled to her dower-estate therein, and complainants ask that such interest may be subjected to the payment of their judgment. The other defendants are heirs of the intestate, and the answers admit the material averments of the bill. * * *

MR. JUSTICE WYLIE delivered the opinion of the court:

The only question to be decided in this case is, whether the dower-right of a widow, which has not been assigned to her, may be subjected in equity to the payment of her own debts, contracted since the death of her husband. At law, until after dower has been set off to the widow, she is regarded as possessing no estate in the property which she can alien or subject to the payment of debt; so that neither by process of law, nor by her own act, can her right be assigned so as to vest it in another. She may release this right it is true, but only so as to unite it with the fee. (See *Seymour v. Minturn*, 17 Johns. R., 167; *Jackson v. Aspel*, 20 ib., 412; *Croade v. Ingraham*, 13 Pick. R., 33; *Blain v. Harrison*, 11 Ill. R., 384; *Gooch v. Atkins*, 14 Mass., 378.)

But in equity it is otherwise. It was decided by the Chancellor in *Tompkins v. Fonda*, 4 Paige Ch. R., 448, that the widow has no right, in conscience, to deprive her creditors of the benefit of her right of dower for the satisfaction of their claims, by continuing in joint possession with the heirs and neglecting to ask for a formal assignment; which assignment if made would enable the creditors to reach her dower by execution.

It is manifest in this case that an assignment of dower by metes and bounds is not practicable. The widow's interest can be reached only through the rents and profits. A receiver must therefore be appointed, with power to take charge of and rent out the property in question until, from the widow's share of the rents and profits, the judgment in favor of the complainants shall have been satisfied; also the costs of this suit.

BARRETT v. FAILING AND WIFE.

111 U. S. 523; 28 L. Ed. 505; 4 Sup. Ct. 598. (1884)

GRAY, J. * * * It is not doubted that the decree of divorce from the bond of matrimony, obtained by the plaintiff in California, in a court having jurisdiction to grant it, and after the husband had appeared and made defense, bound both parties and determined their status. The question considered by the Court below and argued in this court is whether, by virtue of that decree, and under the law of Oregon, the wife is entitled to one-third of the husband's land in Oregon. Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred, or alimony to be paid by one party to the other. In estimating and awarding the amount of alimony or property to be so paid or transferred, the court of divorce takes into consideration all the circumstances of the case, including the property and means of support of either party; and the order operates *in personam*, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated.

Accordingly, it has been generally held that a valid divorce from the bond of matrimony, for the fault of either party, cuts off the wife's right of dower, and the husband's tenancy by the curtesy, unless expressly or impliedly preserved by statute. *Barber v. Root*, 10 Mass. 260; *Hood v. Hood*, 110 Mass. 463; *Rice v. Lumley*, 10 Ohio St. 596;

Lamkin v. Knapp, 20 Ohio St. 454; Gould v. Crow, 57 Mo. 200; 4 Kent, Comm. 54; 2 Bish. Mar. & Div. (6th Ed.) 706, 712, and cases cited. In each of the Massachusetts cases just referred to, the divorce was obtained in another state. The ground of the decision of the court of appeals of New York in Wait v. Wait, 4 N. Y. 95, by which a wife was held not to be deprived of her right of dower in her husband's real estate by a divorce from the bond of matrimony for his fault, was that the legislature of New York, by expressly enacting that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," had manifested an intention that she should retain her right of dower in case of a divorce for the misconduct of the husband. See, also, Reynolds v. Reynolds, 24 Wend. 193. The decisions of the supreme court of Pennsylvania in Colvin v. Reed, 55 Pa. St. 375, and in Reed v. Elder, 62 Pa. St. 308, holding that a wife was not barred of her dower in land in Pennsylvania by a divorce obtained by her husband in another state, proceeded upon the ground that, in the view of that court, the court which granted the divorce had no jurisdiction over the wife. And see Cheely v. Clayton, 110 U. S. 701. * * *

SEC. 3. CURTESY.

Litt. Sec. 35.

Tenant by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the childe was born alive. Therefore *Quaere*.

Co. Litt. 30a.

Four things doe belong to an estate of tenancy by the curtesie, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is dis-seised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the descent, as is aforesaid.

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

DAVIS et al. v. MASON.

1 *Pet. (U. S.)* 503; 7 *L. Ed.* 679. (1828)

The lessee of Richard B. Mason commenced an action of ejectment in the Circuit Court for the district of Kentucky, against John Davis and others, tenants in possession, for the recovery of eight thousand acres of land, claiming to recover the same under a right of entry under, and by virtue of a grant from the state of Virginia to George Mason of Fairfax, dated 19th of March, 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest, (they being children of the patentee), to George Mason of Lexington, the eldest son of George Mason the patentee. George Mason, the grantee and the father of the lessor died the —— day of December, 1796, having first made his last will and testament; in a codicil to which, made on the 3d. of November, 1796, he devised to the child of which his wife was then *enciente*, his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, is, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved, and admitted to record, according to the laws of Kentucky, and was said to vest the title in Richard B. Mason. * * *

The next instruction prayed for by defendants, and rejected by the Court, was; "that if from the evidence, the jury believed that the daughters of the patentee were dead before the suit was brought; that

then they ought to find for defendants, as to the undivided interest of such daughters, and that the deed did not pass their interest. The Court instructed the jury, that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by courtesy; although they had never had other or further possession of the land, than what they acquired by deed.

To understand this part of the bill of exceptions it is necessary to notice, that from the record it appears, that among the parties of the first part to the deed to G. Mason the younger, were four daughters of G. Mason the elder, and their husbands; that the daughters had formally executed a release of inheritance, under a commission issued from a Court in Virginia; but because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky, and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands, as tenants by the courtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the Act of Congress. To the introduction of this testimony an objection was made and overruled; and this constituted another ground of exception, which however has been very properly waived by the counsel in argument here. It appears that the requisitions of the Act have been well complied with.

This testimony, besides establishing the pedigree, marriage, and birth of issue, &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether in the absence of evidence of actual seisin, the husbands had good estates as tenants by the courtesy, in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the courtesy, evidence is introduced into the bill of exceptions to prove, that "the adverse possession of the premises, relied on by the defendants, did not commence until after the execution of the deed and after the death of George Mason; in other words, that the land was waste, or as is sometimes styled, wild lands," at the time of executing the deed, and at all times before and down to the time of the devise, from George Mason, Jun. to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the Common Law, have never been applied to a wife's estate in lands of this description. In the state of New York (8 Johns. Rep. 271) these rules have been solemnly repelled; and we know of no adjudged case, in any of the states, in which they have been recognized as applicable. It would indeed be idle to compel an heir or purchaser, to find his way through pathless deserts, into lands still overrun by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the Conqueror introduced this tenure; the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel.

It is true, that Perkins and Littleton, and other authors of high antiquity, and great authority, lay down the necessity of actual seisin, in very strong terms, and exemplify it, by cases, which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason.

The distinction is taken, between things which lie in livery and things which lie in grant; and with regard to the latter, the seisin in law, is enough, because they admit of no other and as Lord Coke observes "the books say it would be unreasonable the husband should suffer, for what no industry of his could prevent;" and further "that the true reason is, that the wife has those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant when she has a right to it, and nobody else interposes to prevent it." And in another place he says "a husband shall be tenant by courtesy, in respect of his wife's seisin in law, where it was impossible for him to get an actual seisin," for "the favour which the law shows to the husband that has issue by his wife shall not be lost without some default in him." So when describing what is livery of seisin, and defining the distinction between livery in deed, and livery in law, he says of the latter "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time the Common Law had begun to untrammel itself of the rigorous rule, that livery of seisin, or entry, was indispensable to vesting a freehold; the fact may be cited, that livery of seisin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known, arose out of

an effort to disembarass the transfer of titles of an idle form, which had survived the feudal system.

As it relates to the tenure by courtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made in order to vest a freehold; (Co. Lit. 51,) and out of that member of the definition of the tenure by courtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the heir made title direct from the grandfather, or other person last seised.

But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery; or in any mode affecting the course of descent.

If a right of entry therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin in law "he has the thing, if he has a right to have it." Such was not the ancient law; but reason of it has ceased. It has been shown, that in the most remote periods, exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British Courts in the liberality of our views, on the subject of this tenure. A husband, formerly, could not have the courtesy of an use; that is, where his wife was *cestuy que use*. (Perkin's Courtesy, fo. 89,) and this continued to be the law, down to the time of Baron Gilbert: (Law of Uses and Trusts, 239,) at present it is fully settled in equity, that the husband shall have courtesy of a trust, as well as of a legal estate, (2 Vern. 536. 1 P. W. 108. Atk. 606,) of an equity of redemption, a contingent use; or money to be laid out in lands.

The case made out in the bill of exceptions, is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants, did not take place until after the death of George Mason, Jr. and of consequence, after the transfer of title by the husbands, and after the devise took effect in favour of the plaintiff's lessor.

* * *

Judgment affirmed.

DEMING v. MILES.

35 *Neb.* 739; 37 *Am. St. Rep.* 464; 53 *N. W.* 665. (1892)

NORVAL, J. This action was brought in the court below by appellee against William H. Miles and Nellie E. Miles, to foreclose a mortgage executed by them upon the west half of the southeast quarter and the east half of the southwest quarter of section 1, town 7 north, of range 28 west of the sixth principal meridian. The district court permitted Laura Miles, the minor child of the said William H. Miles, by a former wife, to intervene in the action. A guardian *ad litem* was appointed for the minor, who filed an answer setting up therein that at the time of the execution of the mortgage the said Laura Miles was the sole owner in fee simple of the land in controversy, having acquired title thereto by inheritance from her mother; that said mortgage conveyed no interest in the lands therein described, and is a cloud upon her title to said premises. The answer closes with prayer that the mortgage be canceled and that the title to the real estate be quieted in said minor. A reply was filed by the plaintiff. Upon the trial the court found that at the time of the execution of the mortgage, said William H. Miles was the owner in fee simple of said real estate; that the mortgage was valid and binding, and a decree of foreclosure and sale was entered for six hundred and twenty-eight dollars and nine cents. For and on behalf of the said minor this appeal is prosecuted.

The record before us shows that on the eleventh day of January, 1879, the defendant, William H. Miles, was the owner in fee simple of the real estate covered by the mortgage, and on said day, by deed of general warranty, he conveyed the same to one Laura C. Murphy, which deed appellant contends was duly recorded on the fourth day of March, 1879; that on the thirteenth day of said month the said William H. Miles was married to said Laura C. Murphy, that on the twenty-second day of January, 1880, the appellant, Laura Miles was born as the lawful issue of said marriage, and that on the twenty-seventh day of the same month said Laura C. died intestate, leaving surviving her, as her sole and only heir, the said minor. Subsequently the said William H. Miles was married to one Nellie E. Murphy, and they, on the sixteenth day of August, 1883, executed, acknowledged, and delivered the mortgage in suit to secure a loan of five hundred dollars, which mortgage was recorded on the eighteenth day of September, 1883, in the mortgage records of Frontier county. * * *

To our minds it is perfectly plain that the mother of appellant at the

time of her death was the owner in fee simple of the real estate involved in this litigation. Under the law in force at the time of the death of the mother the husband, William H. Miles, took only a life estate in the lands, and, subject to his right of curtesy, they descended to appellant as the sole and only heir at law of Laura C. Miles, deceased. The mortgage did not convey the fee-simple title, and the district court erred in so finding and in entering the decree it did, for the reason that William H. Miles only owned an estate by the curtesy. The life estate of a husband as tenant by the curtesy in the real property of his wife of which she died seised is subject to seizure and sale on execution against him. Likewise a tenant by curtesy may convey his title by deed or mortgage: *Forbes v. Sweesy*, 8 Neb. 525; *Lessee of Canby v. Porter*, 12 Ohio, 79; *Shortall v. Hinckley*, 31 Ill. 219; *Rose v. Sanderson*, 38 Ill. 247; *Lang v. Hitchcock*, 99 Ill. 550; *Bozarth v. Largent*, 128 Ill. 95; *Edmunds v. Leavell*, (Ky. Feb. 10, 1887) 3 S. W. Rep. 134. It is clear from the foregoing authorities that the mortgage covered the interest of the mortgagor in the premises. Appellee is entitled to a foreclosure and sale only of the life estate of the defendant William H. Miles.

It is claimed that the mortgage is invalid, for the reason that at the time of the death of Laura C. Miles the premises were occupied by her and her husband as a family homestead, and the husband therefore could not encumber the same. As no such issue is tendered by the pleadings in the case we will not take the time to consider the point raised in the brief of counsel.

Lastly, it is urged that William H. Miles has no estate by the curtesy in the premises for the reason appellant's mother acquired title thereto directly from him by a deed of general warranty, and the cases of *McCulloch v. Valentine*, 24 Neb., 215, and *Pool v. Blakie*, 53 Ill. 495, are cited in the brief of counsel in support of the proposition. An examination of these authorities will show that they are not in point. In the case in our own reports one Ebenezer McCulloch, by his last will and testament, provided that a certain farm owned by the testator should be sold by his executors, and the money arising therefrom be equally divided among his daughters, stipulating that the share going to his daughter, Elizabeth Pemberton, should be retained by his sons, Ebenezer Z. and George C., who were by the will appointed trustees for that purpose, and who were "to retain the same in trust for the benefit of said Elizabeth Pemberton and her children, her husband to have no control over the same, but that the said trustees might, with the consent of said Elizabeth Pemberton, invest the same as they should deem best,

so that the daughter and her children shall have the benefit of the same without the control of her husband."

The farm was sold in accordance with the provisions of the will, and with the share of the funds intended for Elizabeth Pemberton the trustees purchased a quarter section of land in Hamilton county in this state, and a deed therefor was taken in their own names as trustees, the *habendum* clause of the deed reading, "To have and to hold the said real estate, with the appurtenances to the said second parties as trustees of said Elizabeth Pemberton, they being appointed as trustees by the will of their father, * * * for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land, or any part thereof, on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyance." Subsequently Elizabeth Pemberton died intestate leaving her husband and their three children surviving her. Afterwards it was sought to sell the lands, under an execution against the husband. This court held that he took no estate in the lands as tenant by the curtesy. The Illinois case is quite similar to the one reported in 24 Nebraska. In each case the instrument construed specified in effect that the property therein described was for the sole and separate use and benefit of the wife, and that the husband should have no interest and title in, or control over, the same. But the deed under consideration in the case at bar contains no limitations whatever. The fact that William H. Miles was the grantor in the deed does not bar his right to an estate by curtesy, since such right was not limited by the conveyance: *Robie v. Chapman*, 59 N. H. 41; *Soltan v. Soltan*, 93 Mo. 307.

The decree of the district court is reversed, and the cause is remanded to said court, with instructions to enter a decree of foreclosure and sale only of the life estate of the defendant William H. Miles, in the mortgaged premises and quieting the title to the property in the appellant, Laura Miles, subject to said estate by the curtesy.

Judgment accordingly.

The other judges concur.

ZEUST v. STAFFAN.

10 App. D. C. 260. (1900)

MR: CHIEF JUSTICE ALVEY delivered the opinion of the court:

* * * With respect to the deed from the trustee, William J. Miller, to Mrs. Mary A. Staffan, dated October 30, 1871, we perceive no ground for the contention made by the surviving husband, that he is entitled to an estate by the curtesy in the real estate conveyed by that deed. The language is too explicit to admit of doubt. In the language of the deed, the estate was conveyed to the wife, under a power and by the direction of the husband, in fee simple, absolute, for her sole use and benefit, free from the control and ownership of the husband. By this language all the marital rights of the husband in the property were excluded, and the wife was invested with full and complete right and power of disposition, either by deed or will, free from any right or estate by the curtesy in the husband. This limitation to the sole and separate use of the wife, free from the control and ownership of the husband, conferring upon the wife as it does, the *jus disponendi*, is exactly the same as if the estate had been limited to such uses as the wife by deed or will might appoint, and upon such appointment being made the husband could maintain no claim as tenant by the curtesy as against the disposition of the wife. * * *

JACKSON v. JACKSON.

144 Ill. 274; 36 Am. St. Rep. 427; 33 N. E. 51. (1893)

CRAIG, J. * * * We now come to a consideration of what may be regarded the merits of the case. That is, whether John Jackson was entitled to an estate of tenant by the curtesy in the premises. At common law, "When a man marries a woman seised at any time during coverture of an estate of inheritance, * * * and hath issue by her, born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England": 4 Kent, page 27; Shortall v. Hinckley, 31 Ill. 219. There are four things necessary to constitute the tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. Here all of these facts existed,

and it is plain at common law John Jackson would have an estate by the curtesy in the lands. It may also be remarked in this connection that, under the common law, there were two interests which, under the marriage relation, a husband might acquire in the lands of the wife.

1. By virtue of the marriage alone the husband possessed the right to occupy the lands of which the wife was seised and receive the rents and profits during coverture; and 2. Upon the birth of a child capable of inheriting, the husband became invested with an estate in the lands which, during the life of the wife, was denominated initiate and upon her death it became consummate. There is, however, but little or no dispute between counsel in regard to the rules of the common law on the subject, but the question in dispute is how far and to what extent the common law has been changed and modified by our statute. In 1861 the legislature passed an act known as the "Married Woman's Act," which provides, "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding, her marriage, be and remain during coverture her sole and separate property under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried.

In 1874 the legislature passed an act to revise the law in relation to dower, the first section of which provides as follows: "That the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seised," etc. Under the Act of 1861 and the Dower Act of 1874, it is claimed that Jackson was only entitled to dower in the lands. It will be observed that Paulina A. Jackson acquired the eighty-acre tract of land in 1860, before the Act of 1861 was passed; that she was married in 1858, issue born capable of inheriting in 1859, and also in 1860. As to this tract of land, Jackson had an estate as tenant by the curtesy initiate before the Act of 1861 was passed. This was a vested estate, one which Jackson had he desired, might have conveyed, and one, too, which might have been sold on execution against him: *Shortall v. Hinckley*, 31 Ill. 219; *Mettler v. Miller*, 129 Ill. 640. As the estate of Jackson was a vested estate before the Act of 1861 was passed, it was not within the power of the legislature to destroy it or deprive

him of it by any act that might be passed for that purpose: *Rose v. Sanderson*, 38 Ill. 247. As to the eighty-acre tract of land, we think the decision of the court was correct. * * *

SEC. 4. HOMESTEAD RIGHTS.

ALT. v. BANHOLZER.

39 Minn. 511; 12 Am. St. Rep. 681; 40 N. W. 830. (1888)

MITCHELL, J. The only facts here material are, that a married man executed upon his homestead a mortgage (not for purchase-money), with covenants of title, but without his wife's signature. Subsequently the wife obtained a divorce, and having since become the purchaser of the premises, brings this suit against the mortgagee to have the mortgage adjudged void. Inasmuch as the court finds as facts that the mortgagee knew when he took the mortgage that the mortgagor was a married man, and that the plaintiff, when she purchased, did not agree to pay the mortgage, the questions involved on a former appeal (36 Minn. 57) do not now arise. Two or three well-settled propositions of law are decisive of the case.

1. Under our statute, a conveyance or mortgage (not for purchase-money) of his homestead by a married man, without his wife's signature, is absolutely void, and is not rendered valid by the fact that the premises subsequently lose their character as a homestead: *Barton v. Drake*, 21 Minn. 299. Decisions from other states, construing their statutes as protecting only what may be called the "homestead right," and hence holding that the husband has an estate in the premises outside of and beyond that right, which may be the subject of a sale or mortgage by his sole deed, are not in point.

2. The fact that in this case the wife has since obtained a divorce from the mortgagor is immaterial. A decree of divorce does not relate back, but takes effect only from the date of the judgment.

3. The covenants in the mortgage cannot operate as an estoppel by deed against the mortgagor or his assigns. To work an estoppel, the mortgage itself must be a valid instrument. The covenants can have no greater validity than the deed itself. It would nullify the statute to hold that a deed which the law declares void should, by reason of the covenants of the grantor, operate effectually as a

conveyance: Bigelow on Estoppel, 338-340; Thompson on Homestead and Execution, sec. 474; Connor v. McMurray, 2 Allen, 202; Barton v. Drake, 21 Minn. 299; Conrad v. Lane, 26 Id. 389; 37 Am. Rep. 412. * * *

Order affirmed.

RESKE v. RESKE.

51 Mich. 541; 47 Am. Rep. 594; 16 N. W. 895. (1883)

COOLEY, J. The bill in this case is filed to protect a homestead right, and to enjoin a threatened sale upon execution.

The facts appear to be that in January, 1880, complainant purchased a city lot on the corner of Chene and Mother streets, in Detroit, intending to make of it a homestead. He was then a single man, but was anticipating the arrival very shortly of a young woman from Germany whom he was to marry. The woman came on, and they were married immediately, according to the previous expectation. Neither of them seems to have had means, but they caused the lot to be fenced, and commenced making use of it in connection with the business of selling wood. A barn and a shed were built, a well was dug, complainant kept his horses on the lot, and also hogs and poultry. Mrs. Reske assisted her husband in his business, and received orders for wood, and wood to some extent was piled on the lot for sale. At first, complainant lived with his wife at some considerable distance from the lot, but soon took board across the way, and remained there while building. In the spring of 1881 complainant talked with a builder about the cost of a house, and obtained his figures, but not being able to go on then, the matter was left in abeyance. As complainant and his wife earned any thing, they put it in improvements on the lot; to give his language: "I built every day as soon as I got a little money ahead." It was toward the end of 1882 before they were able to put up a house, and they were not living in this until January, 1883.

Meantime, defendant, on November 28, 1882, had obtained a judgment against complainant for \$546.77 and costs, and by virtue of an execution on this judgment had caused levy to be made upon this lot before complainant had commenced building his house, and was proceeding to a sale when this bill was filed. The value of the lot, as

now improved, is shown to be under fifteen hundred dollars. Defendant by her answer to the bill, contests the fact of the lot having been purchased by complainant for a homestead, and gives evidence of statements made by him that he bought the lot for use in connection with his business. We are entirely satisfied however that his intention to make it a homestead existed from the time of purchase, and that he proceeded to do so as rapidly as he could earn the means.

The question now is, whether, on the facts recited, the lot had become a homestead in a legal sense before the levy was made upon it. We are of opinion it had. The lot, as has been said, was procured for the purposes of a home, and complainant, aided by the industry and frugality of his wife, was proceeding to make it such as rapidly as their limited means would permit. They inclosed it; they had their domestic animals upon it; they came to live in the immediate vicinity; they made a well; and they put up outbuildings. Everything but the dwelling proper had been erected before the levy was made, and complainant was bargaining with a builder for a house. If any thing was lacking to make the lot a homestead, it was because the poverty of complainant had precluded his advancing his improvements as rapidly as he desired. The lot however, in the minds and hearts of complainant and his wife had been appropriated as a home from before the day of their marriage; it was all the home they had; it represented all their scanty means, and was the center of their domestic hopes and aspirations. They did not as yet sleep upon it or take their meals upon it; and probably if they had done this in some of the buildings already constructed, their right to claim a homestead would not have been disputed. But this is not an indispensable condition; the man who buys a home which is all ready for occupancy, cannot have it taken from him as he is attempting to move in his goods, because he has not yet eaten or slept within it. Any one might be deprived of a homestead if so narrow a construction of the privilege should prevail. It is people like this complainant and his wife, with very limited means, that the law encourages with its promise to save their home to them if they will but secure one; and it would be a deceptive promise if it were only made on conditions which any creditor might so easily defeat. We think it was meant to be effective in cases like the present, and that complainant is entitled to the relief he prays.

Decree will be entered for complainant with costs of both courts.

Judgment Affirmed.

CHAPTER XV.

RIGHTS OF ENJOYMENT.

- Section 1. Earth and Minerals.
- Section 2. Vegetable Products.
- Section 3. Fixtures.
- Section 4. Divided Ownership.
- Section 5. Waste.
- Section 6. Land Under Water.
- Section 7. Fish.

SEC. 1. EARTH AND MINERALS.

GODDARD v. WINCHELL, *supra*, p. 6.

BROWN v. SPILLMAN, *supra*, p. 10.

SEC. 2. VEGETABLE PRODUCTS.

SMITH v. LEIGHTON.

38 *Kansas*, 544; 5 *Am. St. Rep.* 778; 17 *Pac.* 52. (1888)

JOHNSTON, J. This proceeding brings up for review a judgment rendered in an action brought by C. A. Leighton against Elias Smith, to recover the value of certain grass which Smith cut and carried away from the premises of Leighton. On July 10, 1883, and for some time prior thereto, one V. Lillard owned a quarter-section of land in Lyon County, which on that day he sold and conveyed by warranty deed, without reservation, to C. A. Leighton. Before that time, he had leased the land to Elias Smith for the year 1883, and Smith had sublet it to A. Hill, who was in possession before the sale of the land;

and in May, 1883, Lillard made a verbal sale of some grass growing on a certain meadow of the premises for sixty-five dollars. About the last of July or the 1st. of August, 1883, Smith cut and took the grass from the premises; and subsequently, when Leighton demanded compensation for the grass, Smith stated that he was ready to pay for the same as soon as he learned to whom payment should be made. Trial at the April term, 1886, when Leighton recovered \$75.78, which is the amount Smith agreed to pay for the grass, together with seven per cent interest. The defendant brings the case to this court. * * *

It is next contended that the court erred in excluding evidence offered by Smith, and also in directing the verdict in favor of Leighton. We think the result reached is substantially just and correct. Smith claimed the right to the grass by virtue of a parol agreement with Lillard, by which he was to pay sixty-five dollars for the grass when cut; and also claimed that the purchase price of the grass was for the rent of the meadow-land on which it grew. The land upon which the grass stood was conveyed to Leighton subsequent to the parol agreement, and while the grass was yet green and growing. It is stated that the grass was growing on an inclosed and cultivated meadow; but it does not appear whether it was an annual or perennial growth. It is a general rule that growing grasses, whether wild or cultivated, are a part of the land, and require an agreement in writing for their sale and severance from the land. Smith contended that this agreement is within some of the exceptions to the general rule, and sought to bring it within the claimed exceptions by offering to show that Leighton knew of his lease upon the land, and of the sale of the grass, prior to his purchase of the land, which offer was refused. However, as the case comes up, we need not examine the sufficiency of this contention, or the competency of the testimony. In the deed of conveyance from Lillard to Leighton there was no reservation of the grass, or exception of any kind. In such a case, and as between grantor and grantee, it is well settled here that the growing crops pass to the grantee: *Garanflo v. Cooley*, 33 Kan. 137; *Chapman v. Veach*, 32 Id. 167; *Babcock v. Dieter*, 30 Id. 172; *Smith v. Hague*, 25 Id. 246. When the conveyance was made and delivered, it carried with it the right to the crops and to collect all unpaid rents; in other words, Leighton was substituted as owner and landlord in place of Lillard. There being no reservations, Lillard from that time forth had no claim upon the crops or the rent due from the tenants. Smith had not paid for the grass, and whether the amount agreed to be paid is treated as the purchase price of the grass, or as rent money

for the meadow, is immaterial. Smith was owing the price of the grass to some one, and he refused to pay only because he did not know to whom it was due. The amount found by the jury as the value of the grass is the same as that which Smith had agreed to pay for the same, with interest to the time of judgment, and the payment of this judgment will discharge Smith from all liability for the grass.

The judgment of the district court will be affirmed.

SIMS v. JONES.

54 Neb. 769; 69 Am. St. Rep. 749; 75 N. W. 150. (1898)

HARRISON, C. J. The plaintiff herein, alleged for cause of action that in a suit instituted in the county court of Custer county against his debtor, Thompson Sims, the plaintiff procured to be issued a writ of attachment, which was delivered to the defendant in this cause, the sheriff of Custer county, who levied the writ on certain property of the said debtor of plaintiff of sufficient value to satisfy the claim of plaintiff as stated in the writ, and that through the subsequent abandonment of the levy by the officer the plaintiff was damaged in the amount sought to be recovered in the attachment suit. It appeared that the defendant in the last-mentioned case was the owner of land in Custer county, which had been leased, the owner to receive as rent the one-third of the crops raised during the year, and that on about twenty five acres of the land oats were sown and on ninety acres corn was planted and grown. The levy of the writ of attachment was alleged to have been on any interest the landlord possessed at the time in the crops. The oat crop had been cut and almost, if not all, stacked, but none threshed. The corn was standing in the field ungathered, whether matured or not does not appear, but the time of the levy would raise the presumption that the corn had not then ripened. The one-third of the oats were to be delivered to the owner of the land after threshing, and the one-third of the corn in the crib. In the district court a jury was waived, and of the issues there was a trial by the court, which resulted in a determination that the defendant in the attachment suit had no attachable interest in the crops at the time the levy was made, and judgment was rendered in favor of defendant in the case at bar.

Many cases hold that under such a contract as we have hereinbefore

outlined the tenant is the owner of the crops until the division is made, and the owner of the land acquires and has no interest therein until his stipulated portion is set apart to him: *Rees v. Baker*, 4 G. Greene, 461; *Alwood v. Ruckman*, 21 Ill. 200; *Woodruff v. Adams*, 5 Blackf. 318; 35 Am. Dec. 122; See, also, portion of note to *Putnam v. Wise*, 37 Am. Dec. 319. And it has been held that the landlord of such a lease has no leviable interest in the crops: *Walston v. Bryan*, 64 N. C. 764; *Shinn on Attachment and Garnishment*, sec. 32; *Howard County v. Kyte*, 69 Iowa, 307. On the other hand, it has been concluded that a landlord and tenant of a letting of land as herein involved are tenants in common of the crops: See *Putnam v. Wise*, 1 Hill. 234; 37 Am. Dec. 309, and note thereto, 317, 318. The interest of a tenant in common may be levied on and sold: *Bernal v. Hovious*, 17 Cal. 541; 79 Am. Dec. 147; *Veach v. Adams*, 51 Cal. 611; *Branch v. Wiseman*, 51 Ind. 3. That growing annual crops are personal property and subject to levy and sale as such for the satisfaction of the indebtedness of an owner has been recognized in this state, see *Johnson v. Walker*, 23 Neb. 736. See, also, generally, 1 *Freeman on Executions*, sec. 113, and citations in support of the text. It also seems to be indicated by the section 530 of the Code of Civil Procedure, in relation to exemptions, wherein it states; "No property hereinafter mentioned shall be liable to attachment, execution, or sale, or any final process issued from any court in this state, against any person being a resident of this state and the head of a family. * * * The provisions for the debtor and his family necessary for six months' support, either provided or growing, or both, and fuel necessary for six months." In the chapter of the Code of Civil Procedure relative to executions for the enforcement of judgments rendered by a justice of the peace is the following: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached, by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process did not issue, shall not be affected thereby": Code Civ. Proc., sec. 1073. This seems to be a direct recognition by the legislature of the doctrine that a landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops and the interest of either subject to levy and sale for the payment of debts of the respective parties.

The supreme court of Kansas, in an opinion in the case of *Polley v. Johnston*, 52 Kan. 478, quote paragraph 5008 of the code of that

state (part of procedure applicable in actions before justices of the peace), as follows: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue"; and observe in relation to this and some other paragraphs considered in the same connection that: "While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law—that such growing crops are personal property, subject to sale on execution for the debts of the owner; and were we to hold a different rule to apply in this case, the only class of debtors benefited thereby would be those owning both the soil and the crop, for the section of the justice's act just quoted renders the shares of landlord and tenant, where that relation exists, both subject to levy and sale." The question of a levy on the interest of a landlord or tenant in growing crops where rent is reserved in kind was not directly in issue, but the foregoing statement furnishes a very strong indication of what might be the conclusion of the court on the subject should it be presented. We feel bound to follow the very evident intention of the legislators, and must conclude that the landlord's interest in the crops was a leviable one; and it results that the judgment of the trial court must be reversed and the cause remanded.

Note: Cultivated blackberries growing on bushes were held not to be subject to execution in *Sparrow v. Pond*, 49 Minn. 412; 32 Am. St. Rep. 571; but peaches requiring annual attention and expense were held subject to execution in *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452.

SEC. 3. FIXTURES.

SNEDECKER v. WARING.

12 N. Y. 170. (1854)

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corliss v. Van Sagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the latter authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; *Hilliard on Mortgages*, 294, note f, and cases there cited; and see *Bishop v. Bishop*, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American courts deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or whatever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected

with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures and statues used to spout water at fountains, were regarded as immovable, or real. Pandects, lib. 19, tit. 1, 17, vol. 7, by Pothier 107; though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as a part of the construction, but as ornaments. Corp. Juris, Civ., by Kreigel, lib. 19, tit. 1, 17; Poth. Pand. 109; Burrill's Law Dic. "*Affixus.*" But Labeo held the rule to be "*ea quae perpetui usus causa in aedificiis sunt aedificiū esse; quae vero ad praesens, non esse aedificiū;*" thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by the civilians, "its destination;" Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, 17.

And Pothier says that when, in the construction of a large vestibule or hall niches are made, the statues attached ("attachees") to those niches make part of the house, for they are placed there *ad inte-*

grandam domum. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues; and, he says, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt*:" Pothier de Communaute, 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap., 525. But statues standing on pedestals in houses, court-yards, and gardens retain their character of "movable" or personal. 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Repertoire Generale, Journal du Palais, by Ledru Rollin, 518, 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work, page 517, 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("*vide choquant*"), a foundation and base no longer appropriate or useful. Ib., 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament. 2 Ledru Rollin, Repertoire Generale, 514. 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its base, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as

it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the court of Cassation in France, in *Hornelle v. Enregistr*, 2 *Ledru Rollin*, *Journal du Palais*, *Repertoire*, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summerhouse of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues, placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real prop-

erty because it is attached by its own weight alone to the foundation designed to give it perpetual support. (See to that effect, *Oakland Cemetery Co. v. Bancroft*, 161 Pa. St. 197.)

It is said the statues and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for 4,000 years. *Taylor's Africa*, 113 *et seq.* And if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the pyramids of Egypt, or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

HOPEWELL, MILLS v. TAUNTON SAV. BANK.

150 Mass. 519; 15 Am. St. Rep. 235; 6 L. R. A. 249; 23 N. E. 327.
(1890)

Tort for the conversion of certain cotton machinery, placed in a cotton-mill, and consisting of a ring frame, mules, looms and loom-beams, a skein-winder, reel, cop-spooler, dresser, four dobbie-heads, a picker-head, or beater, and a cloth brush and shear. This machinery was heavy, and was connected with the power operating the mill by means of pulleys, belts, and shafting, but could be taken out of the mill without injury to the mill, the machinery, or the real estate, except that screw-holes would be left in the floor of the mill, to which the machinery was attached by means of screws. The machinery was adapted to the uses for which it was placed in the mill, namely, the manufacture of cotton cloth. It was not specially built for use in that particular mill, and all of it could as well be used for the same purpose in any other similar mill. Plaintiff, by purchase, became the owner of the cotton-mill and other buildings situated on certain land, and also of a water privilege, by which, together with steam-power, the mill was operated. This purchase was made subject to a mortgage, which included the mill, "with all machinery, tools, and fixtures and furniture therewith appertaining." Subsequently, the machinery in controversy was purchased by plaintiff and placed in the mill, and afterwards the mortgagee foreclosed his mortgage, and conveyed the property to third parties by deed, including the "machinery, tools, and furniture thereto appertaining and belonging." The purchasers entered into possession of the mill and machinery in suit therein, and commenced to use the whole in the manufacture of cotton cloth, and refused to give it up, or allow plaintiff to remove it, although due demand was made. Other facts appear from the opinion.

KNOWLTON, J. This case is submitted on an agreed statement of facts; and, since the burden of proof is on the plaintiff, there must be judgment for the defendants, unless the facts stated establish the plaintiff's title.

There is some conflict of authority, in different jurisdictions, in regard to the question when machines placed in a building become fixtures which pass with a conveyance of the real estate. In this commonwealth, the general principles applicable to such cases have often been considered, and are well established; but there is frequently difficulty in the application of them to particular cases.

The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position; but such a contract cannot affect the rights of a mortgagee, or of an innocent purchaser without notice of it: *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Thompson v. Vinton*, 121 Id. 139; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Id. 542, 545; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289. Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted,—an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place: *Turner v. Wentworth*, 119 Mass. 459; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Id. 542, 545; *Allen v. Mooney*, 130 Id. 155; *Smith Paper Co. v. Servin*, 130 Id. 511, 513; *Hubbell v. East Cambridge Bank*, 132 Id. 447; 43 Am. Rep. 446; *Maguire v. Park*, 140 Mass. 21; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hill v. Farmers' etc. Nat. Bank*, 97 U. S. 450; *Ottumwa Woolen Mill v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719. These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position.

Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact: *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Mooney*, 130 Id. 155; *Maguire v. Park*, 140 Id. 21; *Carpenter v. Walker*, 140 Id. 416; *Southbridge Savings Bank v. Mason*, 147 Id. 500. But the principal facts, when stated, are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can

decide the question. The nature of the article, and the object, the effect, and the mode of its annexation, are all to be considered. In this commonwealth it has been said that "whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty." *Southbridge Savings Bank v. Mason*, 147 Mass. 500; *Pierce v. George*, 108 Id. 78; 11 Am. Rep. 310. This rule generally prevails also in other jurisdictions: *Parsons v. Copeland*, 38 Me. 537; *Holland v. Hodgson*, L. R. 7 Com. P. 328; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hill v. Farmers' etc. Nat. Bank*, 97 U. S. 450; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Delaware etc. R. R. Co. v. Oxford Iron Co.* 36 N. J. Eq. 452; *Roddy v. Brick*, 15 Id. 218, 225; *Ottumwa Woolen Mill v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719.

We are of opinion that this rule is applicable to the case at bar. The building mortgaged was a cotton-mill, and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy; and there is much to indicate that, while there were changes in the kinds of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until they should be worn out, or until, for some unforeseen cause, the real estate should be changed, and put to a different use. Of most of them, it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence. The loom-beams are essential parts of the looms; and although they are not fastened to the looms, but are laid upon them when in use, they are no less real estate than those parts of the looms which are annexed to the realty. No suggestion is made in regard to any other part of the property which calls for a distinction between different articles.

We are of opinion that the agreed facts do not show that the machinery was personal property for which trover can be maintained, and the entry must be, judgment for the defendants.

VAN NESS v. PACARD.

2 Pet. (U. S.) 137; 7 L. Ed. 374. (1829)

MR. JUSTICE STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favour; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions, filed at the trial, it appeared that the plaintiffs in 1820 demised to the defendant, for seven years, a vacant lot in the city of Washington, at the yearly rent of one hundred and twelve dollars and fifty cents, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for one thousand eight hundred and seventy-five dollars. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence, that upon obtaining the lease he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out of doors; and carpenter's work was done in the house, which was in a rough unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence, the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the Court refused to give; and the refusal constitutes his first exception. * * *

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible, and without exceptions. It was construed most strictly between executor and heir in favour of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favour of the former; and with much greater latitude between landlord and tenant, in favour of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the Court in *Elwes v. Maw*, 3 East's R. 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided, that in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections, solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade, and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges at different periods in that country have entertained different opinions

upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting, that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved, by withdrawing from the heir those things, which his ancestor had chosen to leave annexed to the inheritance. But, between landlord and tenant, it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38. was so applicable to their situation, as to give rise to necessary presumption in its favour. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favour any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log-hut, however necessary for any improvement of the soil would cease to be his the moment it was finished. It might, therefore, deserve consideration, whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this Court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present, it is unnecessary to say more, than that we give no opinion on this question. The case, which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated, that the exception of buildings and other fixtures, for the purpose of carrying on a trade or manufacture, is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII. 13, a. and b., where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation, during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt, in *Poole's case*, 1 Salk. 368, in favour of a soap-boiler, who was tenant for years. He held that the party might well remove the vats he set up in relation to trade; and that he

might do it by the common law (and not by virtue of any custom) in favour of trade, and to encourage industry. In *Lawton v. Lawton*, 3 Atk. R. 13, the same doctrine was held in the case of a fire engine, set up to work a colliery by a tenant for life. Lord Hardwicke there said, that since the time of Henry the Seventh, the general ground the Courts have gone upon of relaxing the strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "One reason which weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers." The case too of a cider mill, between the executor and heir, &c., is extremely strong, for though cider is a part of the profits of the real estate, yet, it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider mill was personal estate, notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favour of trade has never been applied to cases like that before the Court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord Hardwicke said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the Court thought the building removable. In *Elwes v. Maw*, 3 East's R. 37, Lord Ellenborough expressly stated, that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is, whether it is accessory to

carrying on the trade or not. If bona fide intended for this purpose, it falls within the exception in favour of trade. The case of the Dutch barns, before Lord Kenyon, is to the same effect.

Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades, which cannot be carried on well, without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, "that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely it cannot be doubted, that in a business of this nature, the immediate presence of the family and servants was, or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and, unless we were prepared to say (which we are not) that the mere fact, that the house was used for a dwelling-house, as well as for a trade, superseded the exception in favour of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke; and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R. 29, proceeds upon principles equally liberal; and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw*, in respect to erections for agricultural purposes. In our opinion, the Circuit Court was right in refusing the first instruction. * * *

HANSON v. VOSS et al.

144 Minn. 264; 175 N. W. 113. (1919)

TAYLOR, C. Replevin to obtain possession of nineteen Murphy door beds, nineteen gas ranges and two laundry stoves. The court directed a verdict for defendant and plaintiff appealed from an order denying a new trial.

Defendant Voss, who will be designated as defendant hereafter, leased a parcel of land in the city of Minneapolis to Harold N. Falk for a term of one hundred years at a specified annual rental payable quarterly. The lease required Falk to erect a brick apartment building on the property "divided into flats and all complete and ready to live therein and to rent," and provided for the execution of a mortgage on the building and land for a part of the cost of the building. Falk erected a building divided into nineteen flats and installed a Murphy door bed and a gas range in each flat and two gas laundry stoves in the basement. He purchased the ranges and stoves from the Minneapolis Gaslight Company under a contract which provided for payment of the purchase price in monthly installments, and further provided that the company retained ownership of them with the right to take possession of and remove them in case of default in such payments. He purchased the beds from the New England Furniture & Carpet Company under a similar contract. These contracts were duly filed in the office of the city clerk. After making the stipulated payments for a considerable time, Falk defaulted therein, and on account of such default the Gas Company was about to reclaim and remove the ranges and stoves, and the Furniture Company was about to remove the beds. Falk was also indebted to A. R. Chesnut in the sum of \$4,000. He and Chesnut made an arrangement with plaintiff by which he conveyed to plaintiff by bill of sale all his interest in the ranges, stoves and beds, and plaintiff agreed to make the remaining payments to the companies as they accrued, and to sell the ranges, stoves and beds as soon as they were fully paid for, and, after deducting his advances with interest from the proceeds, to pay the balance thereof to Chesnut to be applied on Falk's indebtedness to Chesnut. Falk assigned to plaintiff his contract with the Furniture Company and that company assented thereto. Falk's contract with the Gas Company was surrendered and canceled and in lieu thereof a new contract was executed by that company directly to plaintiff. Plaintiff made the payments to the companies as they

accrued until the amounts unpaid were reduced to the sums of \$35 and \$20 respectively.

In the meantime defendant had canceled Falk's ground lease of the land for nonpayment of rent and took possession of the building and the ranges, stoves and beds claiming them as a part of the realty. About five weeks later, and after an unsuccessful attempt to adjust the matter, plaintiff brought this action.

The question presented is whether the court erred in ruling as a matter of law that the ranges, stoves and beds had become a part of the realty.

While there are well-settled general rules for determining whether an article, originally personal property, has become a fixture, that is, a part of the realty, it is frequently difficult to determine whether under the peculiar facts of a particular case, a particular article has become a part of the realty or still remains personal property.

To become a fixture the article must be physically or constructively attached to the freehold. If not attached to the freehold and not an essential or component part of some structure or appliance which is attached to it, the article remains a chattel although intended for permanent use on the premises. If annexed to the freehold the manner in which it is annexed may convert it into realty regardless of other considerations, as where brick or other material has been incorporated into a permanent building or where an article, otherwise a severable chattel, cannot be removed without leaving the freehold in a substantially worse condition than before the annexation. Usually, however, the manner of annexation is not decisive but only one of several facts to be taken into account in determining whether the article has become realty or remains personalty as between the parties concerned. *Northwestern Lumber Co. v. Parker*, 125 Minn. 107, 145 N. W. 964.

In the present case the ranges and stoves were annexed to the building only by the ordinary plumbing fixtures and could be unscrewed from the gas pipes and removed without injury to the building itself. The door beds were arranged to swing back into closets when not in use. In order to receive them the closets were constructed of a greater size and with wider doors than ordinary closets. Each bed rested on a pedestal which was fastened to the floor by screws and served as a pivot on which the bed was swung from the room into the closet or from the closet into the room. There was also an appliance for holding the bed in position which was fastened to the door casing by screws. These beds could be removed without material injury to

the building. Both the ranges and stoves and the beds were annexed to the building sufficiently to constitute them fixtures under some circumstances. So far as annexation is concerned they are in about the same situation as the radiators and office desk held to be fixtures as between mortgagor and mortgagee in *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

Falk took possession of the land as lessee for a term of one hundred years under a lease which required him to erect an apartment building, divide it into flats and fit them ready to rent. In completing the building he placed a gas range and door bed in each flat for the use of those who should rent the flats. These articles were adapted to the purpose for which the building was constructed, and enhanced its rental value, and were intended to be rented with the flats as a part thereof. Under such circumstances Falk's position was different from that of an ordinary tenant who rents a building and installs conveniences therein for his own use, and these articles would clearly be fixtures as between him and defendant if no rights of third parties were involved. But Falk purchased these articles under a conditional sale contract by which they were to remain chattels with the title and right of removal in the vendors. They never became Falk's property and he never acquired the right to make them a part of the realty. He defaulted in the stipulated payments and when the vendors were about to retake their property, he made an agreement with the vendors and the plaintiff by which the plaintiff was substituted in his stead as purchaser and was to become the owner of these articles on completing the payments as provided in the contracts. Plaintiff had no interest in the real estate either as tenant or otherwise; neither had Chesnut for whose benefit plaintiff seems to have taken over the contracts. Plaintiff dealt with these articles as chattels, and intended that they should remain chattels. This clearly appears from the fact that if they became a part of the realty in which he had no interest, he would acquire nothing by his payments and would be unable to carry out his contract with Chesnut. He clearly had the right as against Falk to remove these articles from the building, and the question here is whether he also had that right as against defendant.

The rule that articles so annexed to the freehold as to appear to be fixtures pass to a subsequent purchaser who buys the land, without notice of the rights of third parties in such articles, does not aid defendant, for she is not a subsequent purchaser, but acquired all her rights in the land before the articles in controversy were annexed to it. As against plaintiff, she is in substantially the same position as a subse-

quent purchaser with notice of his rights, and has no better claim to these articles than a prior mortgagee of the realty would have. Such a mortgagee cannot hold as a part of the realty articles annexed to it by the mortgagor but to which the mortgagor never acquired title. *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

In *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110, trade fixtures purchased under a conditional contract of sale were installed by the vendee in a leased building and were subsequently surrendered with the building to the landlord who thereafter claimed them as part of the realty and leased the building with the fixtures therein to other parties. It was held that the landlord had no better title to the fixtures than the vendee in the conditional contract of sale, and that the vendor was entitled to recover their value from him on his refusal to surrender them.

In *Northwestern Mutual Life Insurance Co. v. George*, 77 Minn. 319, 97 N. W. 1028, 1064, a refrigerating plant purchased under a conditional contract of sale was installed in a cold storage warehouse owned and operated by the vendee. The action was between an assignee of the vendor and the holder of a mortgage on the realty executed and recorded prior to the installation of the refrigerating plant. It was held that the vendee had no conveyable title in the refrigerating plant which he could vest in another so as to defeat the rights of the vendor, and that the vendor was entitled to the property as against the mortgagee of the real estate.

In *Merchants' National Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491, an oatmeal mill was erected and equipped with appropriate machinery by one Dobson on land belonging to Stanton and in which Dobson had no interest other than that of a mere licensee. The court said that in the absence of an agreement to the contrary the building and machinery would become a part of the realty; that having been placed on the land with Stanton's permission they were personal property as between him and Dobson; and that the plaintiff, claiming under a mortgage of the real estate executed by Stanton prior to the erection of the mill, had "no better or greater right to these annexations than Stanton would have."

In *Pioneer Savings & Loan Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831, the owner of a lot with an uncompleted dwelling house thereon mortgaged it under a promise to complete the building and, among other things, agreed to complete the fireplace by putting in a mantel, grate and tiling. Instead of doing so, he leased the building under an agreement by which the tenant installed the mantel, grate and tiling with the right to remove them. It was held, following Merchant's

National Bank v. Stanton, *supra*, that, although the mortgagee was not a party to the agreement with the tenant and these articles would be a part of the realty except for that agreement, the tenant had the right to remove them.

In *Pabst v. Ferch*, 126 Minn. 58, 147 N. W. 714, L. R. A. 1915E, 822, it was held in effect that a purchaser of real estate without notice of the rights of third parties in articles which appear to be fixtures is entitled to such articles as a part of the realty, but that a purchaser with notice of the rights of third parties is not entitled to them as against such third party.

The question as to whether the holder of a chattel mortgage on an article annexed to the freehold is entitled to such article as against the owner of the real estate, or the holder of a mortgage or other lien thereon, has been answered in favor of the holder of the chattel mortgage by several courts. *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765, 73 Am. St. Rep. 514; *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, 38 Atl. 858; *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Hewitt v. General Electric Co.*, 164 Ill. 420, 45 N. E. 725; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

The case of *Best Mfg. Co. v. Cohn*, 3 Cal. App. 657, 86 Pac. 829, is much like the present case in its facts. There the lessee under a lease which provided for the construction of a mining plant equipped with machinery, and that the land with all improvements thereon should revert to the lessor if the lease should be forfeited for breach of its covenants, purchased the machinery under a conditional contract of sale and annexed it to the realty. He forfeited his lease and failed to pay for the machinery. The lessor took possession of the land and also of the machinery claiming it as a part of the realty. It was held that the vendor of the machinery was entitled to it as against the lessor of the real estate. See, to the same effect, *Wetherill v. Gallagher*, 217 Pa. 635, 66 Atl. 849.

As already stated defendant occupied no better position in respect to the articles in controversy than a subsequent purchaser of the real estate with notice, or the holder of a prior mortgage on it, and we have reached the conclusion that she was not entitled to them as against plaintiff and that plaintiff had the right to remove them.

The rule requiring a tenant to remove what are frequently termed removable fixtures at or before the end of his term does not apply where the duration of the term is uncertain, *Ray v. Young*, 160 Iowa, 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947, Ann. Cas. 1915D,

258, and note attached to the L. R. A. (N. S.) report; nor to a person in the position of the plaintiff herein, *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110.

The order appealed from is reversed.

WATRISS v. FIRST NATIONAL BANK OF CAMBRIDGE.

124 Mass. 571; 26 Am. Rep. 694. (1878)

Contract for breach of covenant, in a written lease from the plaintiff to the defendant, to surrender the premises at the end of the term, "in as good order and condition as the same now are." The plaintiff and another, owning the premises, leased them to the Harvard Bank, on the 1st of January, 1861, for five years, at a fixed rent, with a privilege of an additional term of five years on the same conditions. That lease covenanted for the surrender of the premises at the end of the term in as good order and condition as the same then were, against waste and alterations, and for right of entry by the lessor in case of failure to pay rent or in case of waste. The lessee constructed a fire-proof safe or vault, and a portable furnace; with pipes, flues and registers, and counters, to fit the premises for use as its banking house. The lessee was afterward changed into a National Bank, under the name of the defendant and the plaintiff acquired the sole ownership of the premises. The defendant elected to extend the lease as above provided, and continued in occupation, until on the 7th of October, 1870, a new lease was entered into between the parties, for five years from January 1, 1871, at an increased rent, the new lease containing the same provisions as the old one in other respects, with an additional covenant that in case of destruction or damage of the premises by fire or other unavoidable casualty, a proportionate deduction should be made from the rent until the injury should be repaired, or the lease should cease, as the lessor should elect. About November 5, 1875, the defendant, being about to remove its business to another place, began removing the fixtures above mentioned. This action was brought for that injury. Plaintiff had a verdict by agreement for \$75, as the damage to the building, if the removal was lawful, and the case was reserved for consideration by the full court, with the understanding that if the plaintiff was entitled to a greater sum and the removal of the fixtures

was unlawful, the case was to stand for trial, otherwise judgment was to be entered on the verdict.

ENDICOTT, J. It is stated in the report that the Harvard Bank soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864 the Harvard Bank was organized as the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed therefore to the defendant upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. *Atlantic National Bank v. Harris*, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors; for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title, not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the meantime acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made no reference to the existing lease or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day, it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease and occupation under it on January 1, 1871, was equivalent to a surrender of the premises to the

lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate; but the tenant may remove them during his term, and, if he fails to do so, he cannot afterward claim them against the owner of the land. *Poole's case*, 1 Salk, 368; *Gaffield v. Hapgood*, 17 Pick, 192; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306, 311; *Shepard v. Spaulding*, id. 416; *Bliss v. Whitley*, 9 Allen, 114, 115, and cases cited; *Talbot v. Whipple*, 14 id. 177; *Lyde v. Russell*, 1 B. & Ad. 394; *Baron Parke*, in *Minshall v. Lloyd*, 2 M. & W. 450. This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined. *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 id. 487, 490; *Martin v. Roe*, 7 E. & B. 237. See, also, *Whiting v. Brastow*, 4 Pick. 310, 311, and note.

There is another class of cases which forms an exception to the general rule. Where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance, and could remove their fixtures, within a reasonable time after such termination. *Antoni v. Belknap*, 102 Mass. 193. In *Penton v. Robart*, 2 East, 88, it was held that a tenant, who had remained in possession after the expiration of the term, had the right to take away his fixtures, and Lord Kenyon said, "He was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretense to say that he had abandoned his right to them." In *Weeton v. Woodcock*, 7 M. & W. 14, a term under the lease had been forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures; and Baron Alderson said that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." Mr. Justice Willes, commenting on these two last cases, in *Leader v. Homewood*, 5 C. B. (N. S.) 546, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant

who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." In *Mackintosh v. Trotter*, 3 M. & W. 184, Baron Parke, after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term." He also refers to *Minshall v. Lloyd*, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron Parke says, under what may be considered an excrescence on the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in, as a trade fixture, under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. The earliest case on the subject is *Fitzherbert v. Shaw*, 1 H. Bl. 258. A purchaser of lands

having brought ejectment against a tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution for a given period; and it was held that the tenant could not, during the interval, remove the fixtures erected during the term and before action brought—on the ground that the tenant could do no act to alter the premises in the meantime, but they must be delivered up in the same situation they were in when the agreement was made and the judgment was signed. This case was followed in *Heap v. Barton*, 12 C. B. 274, where there was a similar agreement, and *Jervis, C. J.*, said that, “if the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so.” In *Thresher v. East London Waterworks*, 2 B. & C. 608, it was held that a lessee, who had erected fixtures for purposes of trade on the premises, and afterward took a new lease to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures, unless strong circumstances were shown that they were not intended to pass under the general words of the second demise; and a doubt was expressed whether any circumstances, *dehors* the deed, can be alleged to show they were not intended to pass. The case of *Shepherd v. Spaulding*, 4 Metc. 416, touches the question. A lessee erected a building on the demised premises, which he had a right to remove, but surrendered his interest to the lessor without reservation; afterward he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was of the whole estate, including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In *Loughran v. Ross*, 45 N. Y. 792; 6 Am. Rep. 173, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See also *Abell v. Williams*, 3 Daly, 17; *Merritt v. Judd*, 14 Cal. 59; *Jungerman v. Bovee*, 19 Cal. 354; *Elwes v. Maw*, 3 East, 38; *Taylor on Landlord and Tenant* (5th ed.), par. 552; 2 *Smith’s Lead. Cas.* (7th Am. ed.) 228, 245, 257.

We are therefore of opinion that the defendant had no right during

the second term to remove any trade fixtures placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them; but, if they were permanent or trade fixtures, the plaintiff may recover for their removal.

Case to stand for trial.

KERR v. KINGSBURY.

39 Mich. 150; 33 Am. Rep. 362. (1878)

COOLEY, J. The controversy in this case concerns certain buildings which are claimed by complainant under a real estate mortgage given March 13, 1874, by defendant Solomon O. Kingsbury, to their testator. The defendant Lyon, on the other hand claims them as tenant's fixtures under a lease of the lands mortgaged.

The facts appear to be that the defendant S. O. Kingsbury, on the 25th day of January, 1871, being then the owner of certain premises situated on Calder and Almy streets in the city of Grand Rapids, leased the Calder street lots for ten years from June 1, 1871, to John S. Long and Samuel P. Bennett, constituting the copartnership of Long & Bennett, who took possession and occupied the same for the purpose of a coal and wood yard. The lease contained a provision allowing the lessee thirty days on its termination for the removal of the buildings they might erect. June 1, 1872, a further lease of a portion of the Almy street lots was made by Kingsbury to Long & Bennett, to terminate at the same time with the other, and containing a similar provision respecting the removal of buildings.

In September, 1873, S. O. Kingsbury purchased of Long his interest in the copartnership of Long & Bennett, and assumed his place in the business, which was thereafter carried on in the name of Kingsbury & Bennett. In February, 1874, S. O. Kingsbury conveyed all the lots on the two streets to Gaius P. Kingsbury. This conveyance does not seem to have been understood by the parties as a transfer to G. P. Kingsbury of anything more than the fee subject to the leases, and the business of Kingsbury & Bennett went on as before. In March, 1874, the deed to G. P. Kingsbury in the meantime not having been recorded, S. O. Kingsbury gave to Henry A. Kerr whom the complainants represent, the mortgage under which they claim. In Janu-

ary, 1876, G. P. Kingsbury gave to Kingsbury & Bennett a new lease of all the lots for five years and five months. This would make the lease terminate at the same time as the former leases, and upon the face of the transaction no reason appears for giving it, unless it was to obtain, for the purposes of the business the copartnership was engaged in, the lots on Almy street which were not covered by the second lease.

The buildings the right to which is in dispute in this case had all been put up as tenants' erections previous to the giving of the Kerr mortgage, and were occupied by the copartnership of Kingsbury & Bennett for the purposes of their business at that time. That firm subsequently became insolvent and made an assignment for the benefit of their creditors to the defendant Lyon, who undertook to remove the buildings as personalty. It is not disputed that as between landlord and tenant the buildings would in general have been removable, but it is insisted that under the facts of this case they are covered by the lien of the real estate mortgage.

1. In brief the claim on the part of the complainants that when Kingsbury & Bennett, in January, 1876, accepted from G. P. Kingsbury a new lease, they in contemplation of law surrendered the existing leases, and not having asserted and exercised a right to remove the erections made previously, they thereby abandoned them to their landlord, and could not assert or transfer to any one else the right to remove them afterward. This is the principal question in the case.

The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy, for the protection of the landlord, and which is, that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures, which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as oc-

cupping in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W. 14.

But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant the right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: "If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterward bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord."

There are some authorities which lay down this doctrine. *Merritt v. Judd*, 14 Cal. 59, is directly in point. That case is decided in reliance upon previous decisions which do not appear to us to warrant it. *Fitzherbert v. Shaw*, 1 H. Bl. 258, was a case in which ejectment having been brought against the tenant, he entered into an agreement that judgment should be signed at a certain time with stay of execution for a period; and the decision that the tenant could not afterward remove fixtures was based upon the agreement. *Lyde v. Russell*, 1 B. & Ad. 394, only asserts the general rule that where the tenant surrenders possession without removing his fixtures he loses his right. *Thresher v. East London*, 2 B. & C. 608, was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., to leave and yield up, etc. *Shepard v. Spaulding*, 4 Metc. 416, has some apparent analogy to the present case, but it is only apparent. There the tenant surrendered to his landlord without removing the fixture in controversy, but undertook to assert the right under a lease made several years afterwards, and which he took when he was as much a stranger to the premises as if he had never occupied them. It is manifest that none of these cases affords any support to the conclusion in *Merritt v. Judd*. And we have been unable to discover in *Landon v. Platt*, 34 Conn. 517; *Davis v. Moss*, 38 Penn. St. 346, or *Haflick v. Stober*, 11 Ohio (N. S.) 482, to which our attention is called in this case, anything important to this discussion.

The case of *Loughran v. Ross*, 45 N. Y. 792; s. c., 6 Am. Rep. 173 is in accord with the case in California. In that case Mr. Justice Al-

len speaking for the majority of the court says: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises and after an interval of time, shorter or longer, had taken another lease and returned to the premises." This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself as understanding to that effect is plainly inferable.

In *Davis v. Moss*, 38 Penn. St. 346, 353, it is said by Mr. Justice Woodward that "If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." This in our opinion is perfectly reasonable, and it is as applicable to other tenancies as it is to those from year to year which are implied from mere permissive holding over.

II. It is further insisted on the part of complainants that the right of the assignee of Kingsbury & Bennett to claim the buildings as fixtures cannot be asserted as against the mortgages given to Kerr, because the mortgagee had a right to assume, when he took the mortgage, that Kingsbury, the mortgagor, occupied the premises as owner of the fee merely, and was conveying to him by way of security everything that as between mortgagor and mortgagee would pass as realty; in other words, that the possession of Kingsbury & Bennett was no notice to Kerr that rights in the buildings were claimed by them as tenants.

It is true as a general rule that the possession of a grantor or mortgagor is no notice to his grantee or mortgagee that he claims any rights in the premises as against the conveyance he gives, *Bloomer v. Henderson*, 8 Mich. 395; *Dawson v. Danbury Bank*, 15 id. 489. But here Bennett as well as Kingsbury was in possession, and Bennett's rights could not be taken away by any act of Kingsbury's. As to Bennett the buildings remained chattels, and it was the duty of Kerr to

take notice of his rights. If he had done so and made the necessary inquiries, he would have ascertained that the buildings were personality; for they could not be realty as to one interest and personality as to another. *Adams v. Lee*, 31 Mich. 440.

We think the decree below was correct, and it must be affirmed with costs.

NOTE:—In *Sanitary District v. Cook*, 169 Ills. 184, 61 Am. St. Rep. 161, and in *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467, the court refused to follow this case.

SEC. 4. DIVIDED OWNERSHIP.

OTTUMWA LODGE v. LEWIS.

34 Iowa, 67; 11 Am. Rep. 135. (1871)

This cause was submitted to the court below, for the purpose of determining the question of the defendant's liability, upon an agreed statement of facts of which the following is the substance, to wit: George C. Merrick was the owner of lot 286 in the city of Ottumwa, and commenced the erection of a brick building thereon. Afterward Merrick, agreed with plaintiff to complete the third story of said building in pursuance of a specified plan, and to deed the same, together with the right of way thereto, to plaintiff, in consideration whereof the plaintiff agreed to pay the sum of \$1,700. The said third story was finished in accordance with the terms of the contract, and plaintiff took possession thereof, and still retains the same.

Merrick deeded the said third story to plaintiff in pursuance of this agreement, and afterward, by regular line of conveyance from Merrick, the defendant, Alvin Lewis, became seized of the lot and the remainder of the building. The building is three stories with a cellar. The roof is flat, rising two or three feet above the ceiling of the third story room at the front, and sloping back, having a fall of two or three feet, and is covered with tin. The roof does not rise above the walls of the building, and there is no garret or other room above the third story room. The roof became out of repair, and the rain coming through fell upon the ceiling of the rooms of plaintiff, and leaked upon the carpet, and furniture therein, to plaintiff's damage. Plaintiff, in

writing, informed defendant that the roof was out of repair, and requested him to repair the same, which defendant neglected and refused to do. After waiting a reasonable time, plaintiff repaired the roof at a cost of \$30.00. which sum was necessarily expended for that purpose.

The court rendered judgment for plaintiff for thirty dollars. Defendant appeals.

DAY, J. From the statement of facts it will be seen that plaintiff is the owner of the third story of the building, and defendant owns the two remaining stories and the ground upon which the erection stands. Although this mode of ownership is not at all unusual in large cities, yet the common law does not clearly define the relative rights and duties of persons so situated. 2 Washb. on Real Estate (2d. ed.), marg. p. 79. Yet enough has been decided to render easy the determination of the question here involved.

In *Tenant v. Goldwin*, 2 Ld. Raym. 1091, it is said that if one man have the upper part of a house and the other the lower, each may compel the other to repair his part in preservation of the others. In an anonymous case in 11 Modern, page 7, it is held, that if a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room those over him may have an action to compel him to keep up and maintain his foundation.

In *Cheesborough v. Green*, 10 Conn. 318, which was a case in which the plaintiff owned and occupied the foundation and first and second stories of a building, and the defendant owned the third story and roof of the same building, and suffered the roof to become leaky and ruinous, occasioning damage to the plaintiff's goods in the lower story, it was held that an action on the case would not lie, but that the plaintiff's remedy must be sought in chancery. In *Loring v. Bacon*, 4 Mass. 575, the defendant was seized in fee simple of a room on the lower floor of a dwelling house and of the cellar under it, and the plaintiff was seized of a chamber over it, and of the remainder of the house. The roof became in such condition that unless repaired no part of the house could be comfortably occupied. The defendant refused to join in making the repairs. The plaintiff then made the necessary repairs and brought an action in assumpsit for labor and materials employed and money expended. Parsons, C. J., announcing the opinion of the court, said: "Although in the case the parties consider themselves as severally seized of different parts of one dwelling, yet in legal contemplation each of the parties has a distinct dwelling-house

adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expenses, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage, if he had not repaired. Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff." These are all the authorities we have been able to find bearing upon this subject. All of them except *Cheesborough v. Green* are adverse to the right of plaintiff to recover. The case of *Cheesborough v. Green*, 10 Conn. 318, does not sanction the right of the owner of the upper story to recover for repairs, but holds that the remedy of the owner of the lower story is in equity and not at law. If each party, respectively is the owner of a distinct dwelling, as held in *Loring v. Bacon*, the solution of the question becomes easy; for no legal principles can readily be discovered upon which a party can recover of another for repairs made upon his own property.

And that, in legal contemplation, each party is the owner of a distinct dwelling cannot, in our opinion, be successfully refuted.

The court erred in finding for plaintiff the value of the repairs made, and its judgment is reversed.

SEC. 5. WASTE.

Coke Litt. 53a.

An action of waste doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or guardian in chivalry by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands, meadows, &c. or in exile of men to the disherison of him in the reversion or remainder. There are two kinds of waste, viz. voluntary or actuall, and permissive. Waste may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten. But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the

house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unlesse he reedifie it againe. Also if glasse windowes (tho' glazed by the tenant himselfe) be broken downe, or carried away, it is wast for the glasse is part of his house. And so it is of wainscot, benches, doores, windowes, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer wast to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *quod non fecit vastum*, but the speciall matter.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste.

If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall downe, the tenant may build the same againe with such materialls as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it.

PYNCHON v. STEARNS.

11 Met. 304; 45 Am. Dec. 207. (1846)

WILDE, J. This is an action of waste, and the case comes before us on exceptions to the instructions to the jury at the trial. The premises described in the writ were formerly the property of Edward Pynchon, and were devised by him to Susan Pynchon, his wife, so long as she should remain his widow, remainder to the plaintiff. The defendant holds under an assignment from the said Susan. * * * As to the alleged acts of waste on the other part of the premises, the plaintiff relied upon sundry facts which are not disputed; namely, that the defendant had opened a way through the premises from one public highway to another; and that the defendant had subverted the soil,

by digging out part of the soil for cellars of houses by him erected; and that he had plowed the lands, dug drains, and had drawn in large quantities of earth, thereby raising the land and changing the surface thereof. The defendant introduced evidence to show that these acts of the defendant were beneficial and not prejudicial to the plaintiff, and did not constitute waste. On this evidence the jury were instructed that the opening of the way was not waste, and that if breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing the surface by breaking up and cultivating it, was not waste; and that the removing the soil for the building of houses, and the erecting them, and digging drains, if the estate on the whole would be equally or more valuable to the owner of the inheritance, would not be waste.

The general rule of law in respect to waste is, that the act must be prejudicial to the inheritance. It is defined by Blackstone, 3 Bl. Com. 223, to be "a spoil and destruction of the estate, either in houses, woods, or lands." It is true, however, that it has been held in England, that to change the nature of the property by the tenant, although the alteration may be for the greater profit of the lessor, was waste. So in England, if the tenant converts arable land into wood, or *e converso* or meadow into plow or pasture land, it is waste: Bac. Abr., Waste, C. 1. The reasons given are, that it changes the course of husbandry, and the evidence of the estate. But these reasons are not applicable in this commonwealth, and consequently such changes here do not constitute waste, unless such changes are prejudicial to the inheritance. So the doctrine is laid down by Mr. Dane, and it is, we think, supported on satisfactory reasons: 3 Dane's Abr. 219. When our ancestors emigrated to this country they brought with them, and were afterwards governed by, the common law of England; excepting however, such parts as were inapplicable to their new condition: Commonwealth v. Knowlton, 2 Mass. 534; Sackett v. Sackett, 8 Pick. 316. That the principle of the common law under consideration was then inapplicable to the condition of the country is obvious; nor has it been applicable at any time since; for it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required. A conformity, therefore, to this usage, cannot be deemed waste. Even in England, "if a meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the plowing of it is not waste." Bac. Abr., Waste, C. 1; Com. Dig. Waste, D. 4. As to the

effect of such changes upon the evidence of title to lands, it is evident that it can have none in this state. Our conveyances are very simple. The land conveyed is described by metes and bounds, or by some general and certain description of its limits, without any designation of the kind of land conveyed, whether it be arable land or grass land, woodland or cleared land, pasture or meadow.

As to the other acts complained of, we think they can not be deemed waste, unless they may be prejudicial to the plaintiff; and that the instructions to the jury, in this respect were therefore correct. To erect a new house on the land where there was not any before, is not waste; Bac. Abr., Waste, C. 5. So there seems no authority for holding that the opening of a way by the defendant, for his convenience, and draining the land, are acts of waste. And as to raising the land, by carrying thereon quantities of earth, whatever may be the law of England, it is not in this commonwealth waste, unless it may be prejudicial to the plaintiff. The ancient doctrine of waste, if universally adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided: *Winship v. Pitts*, 3 Paige, 259, and other cases cited by the defendants' counsel. In this country it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.

For these reasons, we are of opinion that the instructions to the jury were correct.

OWEN v. HYDE.

6 Yerger (Tenn.) 334; 27 Am. Dec. 467. (1834)

Action for waste brought by one of the heirs of Henry Hyde, deceased, against his widow, for cutting timber on a part of the estate assigned to the latter for her dower, the reversion in that part of the dower estate having been set off to the plaintiff, on a division of the land between the heirs subsequent to the assignment of dower. The timber was cut for the purpose of clearing the land for cultivation, though not actually necessary for the defendant's support, the dower

estate including already about one hundred acres of cleared land, most of which, however, was much worn. Some of the timber cut was used in fencing on another part of the dower estate assigned to another of the heirs. The court charged the jury, among other things, that the defendant could cut timber for the purpose of clearing land for cultivation, though not necessary for her support, provided enough timber was left for the permanent use of the dower estate. Verdict and judgment for the defendant, and the plaintiff brought error.

GREEN, J. The question here is, whether the judge erred in his charge to the jury. In order to the formation of a correct opinion in this cause, it is proper to remark, that whatever may be said in relation to the defendant's rights and liabilities must be understood as relating to the whole dower estate. She was not bound to notice any division which may have been made of the reversionary interest among the heirs; she took the dower estate as it was assigned to her with the rights and liabilities which attach to that as a whole; and although she may have destroyed all the timber which was on that part of one of the lots included in her dower, yet, if the dower estate was not injured, but benefited thereby, she would not be guilty of waste, for that is the great criterion by which to determine whether waste has been committed, as that only which does a lasting damage to the inheritance, or depreciates its value, is waste. It is clear, that the cutting timber and clearing land instead of being waste would often greatly enhance the value of the inheritance. In this country, where so large a proportion of the lands are wild, and yet in forest, it is often of great advantage to the estate to destroy the timber and reduce the land to a state of cultivation: 3 Dane Abr. 214, 215; 4 Kent. 76, 77.

It is not a question then, whether the dowager cut the timber from this fifteen acres as a necessary means of support, but it is, did she materially injure the dower estate thereby; if so, she would be liable to an action for waste, but if not, although the clearing was not necessary for her support, and although she may have done it for the purpose of profit, she is not liable. If the cleared land on the dower estate was old and worn, and if the proportion of woodland was such as that a prudent farmer would have considered it best to reduce a portion of it to cultivation, whereby to relieve the old land from excess of culture, and thus enhance the value of the whole dower estate, such clearing would not be waste, provided, "sufficient timber for the permanent use of the dower estate" were left: 7 Johns. 227; 4 Kent, 76.

In respect to the privilege of a tenant for life, in the destruction of timber, the law must necessarily be varied in this country from the

English doctrine. There, we could not well conceive of the destruction of timber without attaching to it the idea of an injury to the estate, as timber is scarce, and forest trees are planted and raised for fuel and for timber, it is of too much value to permit its unnecessary destruction. That not being the state of things here, but on the contrary, as a benefit often results to the estate by clearing away the timber, it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs.

We are therefore of opinion there was no error in the charge of the court, and order the judgment to be affirmed.

NOTE: In *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621, it was said: "The defendant is charged with having converted meadow land into pasture land. In England, this would be waste. But we are not to apply the English law too strictly. Our lands are, in many respects, cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance, and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste."

"It is said that the pastures had been permitted to become overgrown with brush. In England, that would be waste, but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it was waste."

SEC. 6. LAND UNDER WATER.

BARNEY v. KEOKUK.

94 U. S. 324; 24 L. Ed. 224. (1876)

This was an action of ejectment brought by the plaintiff against the city of Keokuk and several railroad companies and a steam-packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings, and sheds on the bank of the Mississippi River, in the city aforesaid. The plaintiff, in his petition, described the premises as follows: "All the land lying and being in

front of lots 5 and 6, in block 3, in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River the full width of said lots." The petitioner states that he is the owner in fee simple of the premises, subject only to the right of the public to use that part of them embraced within the limits of Water Street as a public highway, and is entitled to possession as against the defendants, that the city of Keokuk claims to be the proprietor, and the other defendants occupy as its tenants.

The city, by its answer, admitting that the plaintiff is owner of lots 5 and 6, in block 3, states, in substance, that all the land in front of them down to the Mississippi River was in 1840 dedicated to public use as a street and levee, and, as such, has been used and improved ever since under the possession and control of the city, by virtue of its charter, and has, at its expense been extended out about two hundred and fifty feet by depositing earth and stone in the river, in order to make the wharf and levee more convenient, safe, and useful. Other defences were interposed, which it is not necessary to specify.

The other defendants claim under authority of the city.

The cause was tried by the court, and a special finding of the facts and the law was made.

From these findings, it appears that the city of Keokuk is situated upon a tract of land lying between the Mississippi and the Des Moines Rivers, in Lee County, Iowa, known as the "Half-breed Sac and Fox reservation," which, by treaty with the Sac and Fox tribes of Aug. 4, 1824, 7 Stat. 229, was granted to the half-breeds of those tribes, to be by them held in the same manner as other Indian titles are held. The fee, with power of alienation, was subsequently vested in them. Numerous parties became interested in the tract by purchase, and a town was laid out and lots sold as early as 1837; but no regular town plat, having the requisites of the town-plat law of 1839, seems to have been filed or recorded in the recorder's office of the county. One Galland, who seems to have been a part owner, made out such a plat, and filed it; but there is no proof that he had authority for his acts from the other proprietors. In 1840, suit for a partition of the tract was commenced, and regular proceedings were had, resulting, in October, 1841, in a final decree of partition, made according to the report of commissioners, and embodying a plat or map of the town of Keokuk. Said lots 5 and 6, in block 3, are exhibited on this map, and were drawn by the parties under whom the plaintiff claims title. In its findings of fact, the court sets forth portions of the decree, and, amongst other things, the following:

"In describing each of said shares, the commissioners appointed by the court say, among other things: 'The lots upon Water Street include all the land in front of them to the Mississippi River.'

"And, after describing all the shares, they say:—

"In describing the boundary of the town-lots situated on Water Street in the towns of Keokuk and Nashville, we have made them to include all the land in front of them to the Mississippi River, by which we mean in front of them, facing the river, parallel with the streets running from Fourteenth Street to Water Street.'

"And in describing the plat of Keokuk, the commissioners' report, among other things, says:—

"Plat of Keokuk, in the county of Lee, Territory of Iowa, upon the half-breed tract, the outlines of which were designated and marked by Jenefer T. Spring in his survey as town reservation, * * * Water Street is of unequal and irregular width at the points where the dotted lines pass across the same.

"The street is of the width in feet as is represented by the figures set on said lines. Water Street extends the whole front on river side of the town, or from the intersection of Orleans Street with the Mississippi River, down the right bank of the river, with the meanders thereof, to the intersection of Cedar Street with the Mississippi River.'"

The Galland map was produced on the trial, also a fragment of another map, which bears date August, 1840, found in the recorders' office. By these, as well as the map embodied in the decree, the space between the front of the lots and the river is designated as Water Street, and appears to have been, at that time about one hundred feet wide.

As to the occupation of Water Street in front of the plaintiff's lots, and its extension on the river side, the court found:—

"The city of Keokuk has, since the year 1865, caused the space originally covered by water on the river side of Water Street, in front of said lots, to be filled in with earth and stone for a space of over two hundred feet beyond the original water-line to ordinary high-water mark, and about three hundred and fifty-two feet to low water mark, said filling having been done by said city. That part of the space between the front of said lots and the river at ordinary high-water mark is occupied as follows:—

"1. By the freight-house or depot of the defendant, the Keokuk and Des Moines Railway Company, * * * a permanent and substantial frame building. It has been standing a good many years,

* * * is used for storing freight by said railroad company, is two hundred and three feet long and twenty feet wide, and one story high, and covers the whole of the front of said lots 5 and 6, block 3.

"2. By the railroad tracks used by the defendants, the Keokuk and Des Moines Railway Company, the Mississippi Valley and Western Railway Company (now St. Louis, Keokuk, and Northwestern Railway Company), the Toledo, Peoria, & Warsaw Railway Company, and the Toledo, Wabash, and Western Railway Company. Altogether there are ten railroad tracks between the front of said lots and high-water mark.

"3. By the building known as the Keokuk Northern Line Packet depot, * * * a permanent and substantial building, one hundred feet long and fifty feet wide, formed of substantial timbers, and about fourteen or fifteen feet high. It was built by said packet company for its own use in carrying on its business as a common carrier by steamboats on the Mississippi River, and is used by it in connection with its transportation business for the temporary storage of freight carried or to be carried by said company, and also for the business offices of said company at Keokuk. Said building has five large doors through which teams are driven in delivering or receiving freight, and which doors are closed at night. The building is one and a half stories high, with office rooms on second floor, and the ground floor is of heavy two-inch lumber laid on sills about two feet apart."

The map shows that this building stands on the newly made ground below original high water.

The court further found:—

"That none of the defendants so occupying said ground, nor the city, has caused any condemnation, nor asked or obtained the permission of plaintiff, nor paid him any damages in compensation for the use of said ground. But they all and severally hold the same under the license or permission of the city of Keokuk only." * * *

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below that the dedication of the streets of Keokuk was a dedication at common law, and not under the statute; and that, in making this dedication, the original proprietors of the tract reserved the title to the soil in the street, particularly in Water Street; and that this title went with the several lots fronting on the street, and extended to the Mississippi River. Whether, under the laws of Iowa, it also attached to the new ground formed by filling in upon the bed of the river is not so clear. It appears to be the settled law of that

State that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus v. Carmichael*, 3 Iowa, 1. The above conclusion was reached, and has always been adhered to in that State. *Haight v. The City of Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque, &c. Railroad Co.*, 32 id. 106.

The peculiar origin of the title to the "Half-breed Sac and Fox reservation," in the peninsula lying between the rivers Mississippi and Des Moines, did not take it out of the general rule. This was so held in *Haight v. The City of Keokuk*, *supra*. That case was nearly identical with the present as respects the claim of the adjoining proprietor to the title of the land in Water Street and on the river bank. Haight contested the right of the city to control the wharf along said street, claiming by virtue of his fee-simple title, the right to erect a private wharf and to receive the emoluments thereof. His claim was overruled, and on the question of title the court said:—

"According to the case of *McManus v. Carmichael*, then, Haight owns the soil to high water only. But here is interposed the argument, that this land is not held under the United States by the usual manner of grants, that is, by patent, after a survey, and described by section, town, and range. This is true; but yet it will not affect the extent of the complainant's right. The grant to the half-breeds was to them as persons and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or States, and then the line would have been the *medium filum aquae*, as it is now between Iowa and Illinois. * * * The grant was to them as individuals,—as tenants in common,—and is to be construed as any other grant or sale to individuals."

The court then goes on to refer to various cases to show that the government cannot convey the land between high and low water on the public or navigable rivers, but that this space belongs to the State; citing *Mayor of Mobile v. Eslava*, 9 Port, 578; 16 Pet. 234; *Pollard's Lessee v. Hagan*, 3 How. 212.

It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 id. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court in the case of *The Genesee Chief*, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must

depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject.

The exhaustive examination of this question by the Supreme Court of Iowa in 1856, in the case of *McManus v. Carmichael*, 3 Iowa, 1, really leaves nothing to be said. The precise point was directly before the court,—namely, whether the title of the riparian proprietor extends below high water, in the Mississippi River; and it was decided that it does not. This decision has been followed by subsequent cases, especially the cases of *Haight v. The City of Keokuk*, 4 id. 199; and *Tomlin v. Dubuque Railroad Co.*, 32 id. 106.

But whatever may be the true rule on this vexed question, and whether we rightly comprehend the Iowa decisions or not we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the river side, by filling in below high water, and building wharves and levees for the public accommodation. By the charter of the city, passed Dec. 13, 1848, it was provided,—

“Sect. 14. That the city council shall have power * * * to establish and constitute landing-places, wharves, docks, and basins in said city, at or on any of the city property, and fix the rate of landing, wharfage, and dockage of all steamboats, boats, rafts, and other water-crafts, and of all goods, wares, merchandise, produce, and other articles that may be moored at, landed on, or taken from any landing, wharf, dock, or basin belonging to said city.”

“Sect. 16. That the city council shall have power * * * to license and establish ferries across the Mississippi River from said city to the opposite shore to fix the rates of the same.” * * *

“Sect. 22. The city council shall have exclusive power to establish and regulate the grade of wharves, streets, and banks along the Mississippi River, within the corporate limits of said city.”

And by a supplement, passed Jan. 22, 1853, it was provided,—

“Sect. 7. The said city of Keokuk shall have the power to establish and regulate wharf or wharves in said city, and more particularly to use the whole of Water Street for said purpose.” * * *

Although it should be conceded that the title of the plaintiff attached to the ground reclaimed and filled in by the city outside of the original high water, it was a bare legal title, subject to the public easement and use, not only for street purposes, but for the purposes of wharves, landings, and levees. A street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition,

must be regarded as intended to be used for the purposes of access to the river, and the usual accommodations of navigation in such a connection. This subject is discussed in Haight's case, where the court said,—

“One further thought, presented by the petitioner, should be noticed. It is, that if this ground is dedicated to the public, it is as a street only; and that if his rights are subject to the public uses, they are so subject to the use of it only as a street or highway, and not as a wharf, and that it is named and called a street and not a wharf. He claims that the object of a street is for passage, for traveling over, and not to land or deposit goods upon. This is taking a very narrow and close view. The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily, in their transit to the storehouse; and so of other things, and so it is of the wharf. If goods cannot be deposited upon it in preparation for shipping them, or unladen upon it from boats and vessels, why is a town located near the river upon land which, in other respects, is inconvenient, and is expensive to grade, to bring into form and order, and to keep in repair, instead of upon an even prairie, requiring no such trouble and outlay?”

On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent land-owner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas pipes, and the like; and, according to the laws of Iowa (which must be taken to govern the case), it may be occupied by those improved iron ways for public passage which modern skill has devised, and which the advance of general improvement requires. It cannot be denied that horse-railroads have contributed immensely to the public convenience in furnishing a rapid, cheap, and convenient means of communication between different parts of large towns, and have greatly promoted their increase and growth in wealth and population. By the accommodation which they afford, the citizen can reside miles from his shop or place of business. Though attended with some inconveniences, they have

greatly added to the efficiency of the public thoroughfares, and have more than doubled their capacity for travel and transportation.

So other railways coming to cities add greatly to their population and wealth, and furnish greatly increased facilities of communication with other portions of the country.

In Iowa, by the act called the "Right of Way Act," found in the Code of 1851, sect. 735, it is declared that,—

"The county court may also grant licenses for the construction of any canal or railroad, or any macadamized or plank-road, or any other improvement of a similar character, or any telegraph line, to keep the same up for a period not exceeding fifty years, and to use for this purpose any portion of the public highway or other property, public or private, if necessary: Provided, such use shall not obstruct the highway." Iowa Revision of 1860, p. 206.

By the construction given to this act by the Supreme Court of the State, railroads, especially when located and constructed under municipal regulation and control, are not regarded as obstructions to a highway in the legal sense, nor as creating, when laid thereon, any injury to the proprietors of the adjacent lands, for which they are entitled to compensation. The cases referred to by the Circuit Court (which are given below) abundantly demonstrate this conclusion, and no elaborate discussion of the subject is required from us. See *Milburn v. Cedar Rapids*, 12 Iowa, 249-260; *Clinton v. Cedar Rapids & Mo. Railroad Co.*, 24 id. 455; *Tomlin v. Dubuque Railroad Co.*, 32 id. 106; *Chicago, Newton & S. W. Railroad Co.*, 36 id. 299; *Cook v. City of Burlington*, id. 357; *Clinton v. Clinton & Lyon Railroad Co.*, 37 id. 61; *Ingraham et al. v. Chicago, Dubuque, & Minn. Railroad Co.*, 38 id. 669.

The cases cited, it is true, are generally those in which the fee of the streets was in the cities respectively, as is commonly the case in Iowa. But in *Haight's case*, in 4 Iowa, the very street now in question was under consideration, and the plaintiff had the same title as that of the plaintiff in the present case; and the principles laid down in all the later cases apply as well where the title of the soil is in the adjacent proprietor as where it is in the city or a third party. And, as before remarked, we can perceive no well-founded difference in principle between the one and the other as to the rights of the public.

The Circuit Court is clearly correct, however, in holding that the construction of a permanent freight depot in Water Street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created

or allowed. It is subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public.

We also concur in the view taken by the Circuit Court as to the reasonableness of the erection of the packet depot in the place where it is located. It is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation, and does not occupy any portion of the original street. It is a public use of the river bank, which is absolutely necessary to the use of the river as a navigable water. The erection of levees, wharves, and other accommodations on the very ground appropriated to such purposes by the original plot of the town, or, stronger still, on ground made and reclaimed from the bed of the river adjoining the street thus appropriated, and in enlargement thereof, is clearly within the powers of the city authorities as laid down in the cases referred to.

Judgment affirmed.

SHIVELY v. BOWLBY et al.

152 U. S. 1; 38 L. Ed. 331; 14 Sup. Ct. 548. (1894)

The original suit was in the nature of a bill in equity brought June 8, 1891, by John Q. A. Bowlby and W. W. Parker against Charles W. Shively and wife, in the circuit court for the county of Clatsop and state of Oregon, to quiet the title to lands below high-water mark in the city of Astoria. The case, as appearing by the record, was as follows:

On and before May 20, 1854, John M. Shively and wife were the owners of a donation land claim, as laid out and recorded by him under the act of congress of September 27, 1850, c. 76, (9 Stat. 496,) commonly known as the "Oregon Donation Act," embracing the then town and much of the present city of Astoria, and bounded on the north by the Columbia river.

On May 20, 1854, John M. Shively laid out and caused to be recorded a plat of that claim, not only of the land above high-water mark, but also of adjacent tide lands and a portion of the bed of the Columbia river, including the lands in controversy, and divided into blocks 300 feet square, and separated from each other by streets 30 or 60 feet wide, some running at right angles to, and the others nearly

parallel with, high-water mark, the outermost of which streets were not within 800 feet of the ship channel.

Blocks 4 and 9 were above ordinary high-water mark. Block 146 was in front of block 4, and between high and low water mark. In front of block 9 came blocks 141, 126, and 127, successively. A strip about 50 feet wide, being the southern part of block 141, was above high-water mark, and the whole of the rest of that block was below high-water mark and above low-water mark. The line of ordinary low tide was on September 18, 1876, at the north line of that block; but on December 15, 1890, and for some time before this date, was 100 feet north of the north line of block 127.

On February 18, 1860, John M. Shively and wife conveyed blocks 9, 126, 127, and 146, "in the town plat of Astoria, as laid out and recorded by John M. Shively," to James Welch and Nancy Welch, whose title was afterwards conveyed to the plaintiffs.

On June 2, 1864, John M. Shively laid out and caused to be recorded an additional plat, covering all the space between blocks 127 and 146 and the channel.

In 1865 the United States issued a patent to John M. Shively and wife for the donation land claim, bounded by the Columbia river.

On September 18, 1876, the state of Oregon, by its governor, secretary, and treasurer, executed to the plaintiffs a deed of all the lands lying between high-water mark and low-water mark in front of block 9, including all the tide land in block 141, and also a deed of all the tide lands in block 146, but never executed to any one a deed of any tide lands north of block 146.

The plaintiffs afterwards held possession of the lands so conveyed to them, and maintained a wharf in front of block 127, which extended several hundred feet into the Columbia river, and at which ocean and river craft were wont to receive and discharge freight.

On December 15, 1890, John M. Shively, having acquired whatever title his wife still had in the lands in controversy, conveyed all his right, title, and interest therein to the defendant Charles W. Shively.

On April 7, 1891, the defendants, pretending to act under the statute of Oregon of February 18, 1891, (Laws 1891, p. 594) executed and recorded an instrument dedicating to the public their interest in some of the streets adjacent to these lands.

The plaintiffs claimed, under the deeds from the state of Oregon, the title in all the tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, between the lines of low and ordinary high tide

of the Columbia river; and also claimed all the wharfing rights and privileges in front thereof to the ship channel; and prayed that the cloud created by the defendants' instrument of dedication might be removed, and the defendants be adjudged to have no title or right in the premises, and for further relief.

The defendants denied any title or right in the plaintiffs, except in the west half of block 146; and, by counterclaim, in the nature of a cross bill, stating the facts above set forth, asserted that, under the patent from the United States to John M. Shively, and his deed to Charles W. Shively, the latter was the owner in fee simple of so much of the east half of block 141 as was above high-water mark, and of all the tide lands and riparian and wharfing rights in front thereof to the channel, excepting blocks 126 and 127, and was also the owner of all the riparian and wharfing rights in front of block 4 to the channel, excepting block 146; and contended that the first deed from the state of Oregon to the plaintiffs conveyed no title in that part of block 141 above high-water mark, or in any tide lands, and that Shively's conveyance of specific blocks by reference to his plat passed no wharfing rights in front thereof; and prayed that Chas. W. Shively might have possession of said premises, and damages against the plaintiffs for withholding the same, and further relief.

The court sustained a demurrer of the plaintiffs to the counterclaim, (except as to that part of block 141 above high-water mark,) and dismissed that claim; and then, on motion of the plaintiffs, dismissed their suit, without prejudice to their interest in the subject thereof.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

This case concerns the title in certain lands below high-water mark in the Columbia river, in the state of Oregon, the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the state of Oregon, and is in substance this: John M. Shively, being the owner, by title obtained by him from the United States under the act of congress of September 27, 1850, (chapter 76,) while Oregon was a territory, of a tract of land in Astoria, bounded north by the Columbia river, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high-water mark, and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the state of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by

counterclaim, asserted a title, under a subsequent conveyance from Shively, to some of the tide lands, not included in his former deeds, but included in the deeds from the state.

The counterclaim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia river, and of the conveyance from Shively to the defendant, as against the deeds from the state to the plaintiffs. The supreme court of Oregon, affirming the judgment of a lower court of the state, held the counterclaim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. Hill's Code Or. sections 246, 393.

1. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, *jus publicum*, is vested in him, as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. Moore, *Foreshore*, (3d Ed.) 318, 370, 413.

In that treatise, Lord Hale, speaking of "the king's right of propriety or ownership in the sea and soil thereof" within his jurisdiction, lays down the following propositions: "The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." "But though the king is the owner of this great waste, and, as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some

particular subject hath gained a propriety exclusive of that common liberty." "The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." Harg. Law Tracts, pp. 11, 12. And he afterwards explains: "Yet they may belong to the subject in point of propriety, not only by charter or grant whereof there can be but little doubt, but also by prescription or usage." "But, though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz.: * * * (2) That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances;" "for the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." Id. pp. 25, 36.

So in the second part, *De Portibus Maris*, Lord Hale says that "when a port is fixed or settled by" "the license or charter of the king, or that which presumes and supplies it, viz. custom and prescription," "though the soil and franchise or dominion thereof *prima facie* be in the king, or by derivation from him in a subject, yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse." "But the right that I am now speaking of is such a right that belongs to the king *jure prerogativae*, and it is a distinct right from that of propriety; for, as before I have said, though the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men, and so it is charged or affected with that *jus regium*, or right of prerogative of the king, so far as the same is by law invested in the king." Id. pp. 84, 89.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage, (*Fitzwalter's Case*, 3 Keb. 242, 1 Mod. 105; 3 Shep. Abr. 97; Com. Dig. "Navigation," A, B; Bac. Abr. "Prerogative," B; *King v. Smith*, 2 Doug. 441; *Attorney General v. Parmeter*, 10 Price, 378, 400, 401, 411, 412, 464; *Attorney General v. Chambers*, 4 De Gex,

M. & G. 206, 4 De Gex & J. 55; *Malcomson v. O'Dea*, 10 H. L. Cas. 591, 618, 623; *Attorney General v. Emerson*, [1891] App. Cas. 640;) and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing, (*Attorney General v. Parmeter*, above cited; *Attorney General v. Johnson*, 2 Wils. Ch. 87, 101-103; *Gann v. Free Fishers*, 11 H. L. Cas. 192.) The same law has been declared by the house of lords to prevail in Scotland. *Smith v. Stair*, 6 Bell, App. Cas. 487; *Lord Advocate v. Hamilton*, 1 Macq. 46, 49.

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. Lord Hale, in *Harg. Law Tracts*, pp. 17, 18, 27; *Somerset v. Fogwell*, 5 Barn. & C. 875, 885, 8 Dowl. & R. 747, 755; *Smith v. Stair*, 6 Bell, App. Cas. 487; *U. S. v. Pacheco*, 2 Wall. 587.

By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in *Harg. Law Tracts*, p. 85; *Mitf. Eq. Pl.* (4th Ed.) 145; *Blundell v. Catterall*, 5 Barn. & Ald. 268, 298, 305; *Attorney General v. Richards*, 2 Anstr. 603, 616; *Attorney General v. Parmeter*, 10 Price, 378, 411, 464; *Attorney General v. Terry*, 9 Ch. App. 425, 429, note; *Weber v. Commissioners*, 18 Wall. 57, 65; *Barney v. Keokuk*, 94 U. S. 324, 337.

By recent judgments of the house of lords, after conflicting decisions in the courts below, it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river, and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of parliament which provides for compensation for "injuries affecting lands," "including easements, interests, rights and privileges in, over or affecting lands." The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. *Buccleuch v. Board of Works*, L. R. 5 H. L. 418; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662. "That decision," said Lord Selborne, "must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*." *Railway*

Co. v. Pion, 14 App. Cas. 612, 620, affirming 14 Can. Sup. Ct. 677.

2. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the king of England, and taken possession of in his name, by his authority or with his assent, they were held by the king as the representative of, and in trust for, the nation, and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; and, upon the American Revolution, all the rights of the crown and of parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 595; *Martin v. Waddell*, 16 Pet. 367, 408-410, 414; *Com. v. City of Roxbury*, 9 Gray, 451, 478-481; *Stevens v. Railroad Co.*, 34 N. J. Law, 532; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71.

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is *Martin v. Waddell*, (1842,) 16 Pet. 367, which arose in New Jersey, and was as follows: The charters granted by Charles II., in 1664 and 1674, to his brother, the Duke of York, (afterwards James II.,) included New York and New Jersey and the islands of Martha's Vineyard and Nantucket, and conveyed to the duke the territories therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling, and all other royalties, profits, commodities and hereditaments," thereto belonging or appertaining, and all the "estate, right, title, interest, benefit, advantage, claim and demand" of the king of, in or to the same; as well as full powers of government: provided, however, that all statutes, ordinances and proceedings should not be contrary to, but, as near as conveniently might be, agreeable to the laws, statutes and government of England. All these rights, both of property and of government, in a part of those territories, were granted by the Duke of York to the Proprietors of East Jersey; and they, in 1702, surrendered to Queen Anne all "the powers, authorities and privileges of and

concerning the government of" the province, retaining their rights of private property. Leaming & Spicer's New Jersey Grants, 4, 5, 42, 43, 148, 149, 614, 615. An action of ejectment was brought in the circuit court of the United States for the district of New Jersey for land under tide waters in Raritan bay and river, to which the plaintiff claimed title under specific conveyances of that land from the Proprietors of East Jersey, and of which the defendants were in possession, for the purpose of planting and growing oysters, under a statute passed by the legislature of the state of New Jersey in 1824.

This court, following, though not resting wholly upon the decision of the supreme court of New Jersey in *Arnold v. Mundy*, 6 N. J. Law, 1, gave judgment for the defendants for reasons assigned in the opinion delivered by Chief Justice Taney, which cannot be better summed up than in his own words: "The country mentioned in the letters patent was held by the king in his public and regal character as the representative of the nation, and in trust for them." 16 Pet. 409. By those charters, in view of the principles stated by Lord Hale in the passage above quoted concerning the right of fishing, "the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke;" and "in his hands they were intended to be a trust for the common use of the new community about to be established,"—"a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish,"—and not as "private property, to be parceled out and sold by the duke for his own individual emolument." "And, in the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner, and for the same purposes, that the navigable waters of England, and the soils under them, are held by the crown." *Id.* pp. 411-413. The surrender by the proprietors in 1702 restored to the crown all "its ordinary and well-known prerogatives," including "the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them," "in the same plight and condition in which they originally came to the hands of the Duke of York." *Id.* p. 416. "When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Id.* p. 410.

It was in giving the reasons for holding that the royal charters did not sever the soil under navigable waters, and the public right of fishing, from the powers of government, and in speaking of the effect which grants of the title in the seashore to others than the owner of the upland might have, not upon any peculiar rights supposed to be incident to his ownership, but upon the public and common rights in, and the benefits and advantages of, the navigable waters, which the colonists enjoyed "for the same purposes, and to the same extent, that they had been used and enjoyed for centuries in England," and which every owner of the upland therefore had in common with all other persons, that Chief Justice Taney, in the passage relied on by the plaintiff in error, observed: "Indeed, it could not well have been otherwise; for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property, and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shellfish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." 16 Pet. 414.

The full extent of that decision may be more clearly appreciated by referring to the dissenting opinion of Mr. Justice Thompson in that case, and to the unanimous judgment of the court in the subsequent case of *Den v. Jersey Co.*, (1853,) 15 How. 426.

In *Martin v. Waddell*, Mr. Justice Thompson unavailingly contended that the title in the lands under the navigable tide water—the *jus privatum*, as distinguished from the *jus publicum*—passed as private property from the king to the duke, and from him to the Proprietors of East Jersey, and was unaffected by their surrender to Queen Anne, and therefore passed from them to the plaintiff, subject, indeed, to the public rights of navigation, passing and repassing, and perhaps of fishery for floating fish, but not to the right of planting, growing, and dredging oysters; and also that, if the king held this land as trustee for the common benefit of all his subjects, and inalienable as private property, the state of New Jersey, on succeeding to his rights at the Revolution, could not hold it discharged of the trust, and dispose of it to the private and exclusive use of individuals. 16 Pet. 418-434.

In *Den v. Jersey Co.*, which was ejectment for land under tide water that had been reclaimed and occupied as building lots by a corporation, pursuant to an act of the legislature of the state of New Jersey, the

plaintiff, claiming under a conveyance from the Proprietors of East Jersey, contended that the fee of the soil under the navigable waters of that part of the state was conveyed to the proprietors as private property, subject to the public use; that, the public use having ceased as to the land in question, they were entitled to the exclusive possession; and that nothing but the right of fishery was decided in *Martin v. Waddell*; but the court, again speaking by Chief Justice Taney, held that the decision in *Martin v. Waddell*, being in ejectment, necessarily determined the title to the soil, and governed this case, and therefore gave judgment for the grantee of the state, and against the claimant under the proprietors. 15 How. 432, 433.

3. The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore, below high-water mark, than they had in England; but the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only.

In Massachusetts, by virtue of an ancient colonial enactment, commonly called the "Ordinance of 1641," but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high-water mark, over the shore or flats, to low-water mark, if not beyond 100 rods. The private right, thus created in the flats is not a mere easement, but a title in fee, which will support a real action, or an action of trespass *quare clausum fregit*, and which may be conveyed by its owner with or without the upland, and which he may build upon or inclose, provided he does not impede the public right of way over it for boats and vessels. But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or inclosed, those public rights are not restricted or abridged, and the state in the exercise of its sovereign power of police for the protection of harbors and the promotion of commerce, may, without making compensation to the owners of the flats, establish harbor lines over those flats, beyond which wharves shall not thereafter be built even when they would be no actual injury to navigation. Mass. Colony Laws, (Ed. 1660,) p. 50; Id. (Ed. 1672) pp. 90, 91; *City of Boston v. Lecraw*, 17 How. 426, 432, 433; *Richardson v. City of Boston*, 19 How. 263, and 24 How. 188; *Com. v. Alger*, 7 Cush. 53, 67-81. It is because of the ordinance vesting the title in fee of the flats in the owner of the upland that a conveyance of his land bounding on the tide water, by whatever name,

whether "sea," "bay," "harbor," or "river," has been held to include the land below highwater mark, as far as the grantor owns. *City of Boston v. Richardson*, 13 Allen, 146, 155, and 105 Mass. 351, 355, and cases cited. As declared by Chief Justice Shaw, grants by the colony of Massachusetts, before the ordinance, of lands bounded by tide water, did not include any land below high-water mark. *Com. v. Alger*, 7 Cush. 53, 66; *Com. v. City of Roxbury*, 9 Gray, 451, 491-493. See, also, *Litchfield v. Scituate*, 136 Mass. 39. The decision in *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, affirming 152 Mass. 230, 25 N. E. 113, upheld the jurisdiction of the state, and its authority to regulate fisheries, within a marine league from the coast.

The rule or principle of the Massachusetts ordinance has been adopted and practiced on in Plymouth, Maine, Nantucket, and Martha's Vineyard, since their union with the Massachusetts colony under the Massachusetts province charter of 1692. *Com. v. Alger*, 7 Cush. 53, 76, and other authorities collected in *Com. v. City of Roxbury*, 9 Gray, 523.

In New Hampshire, a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage. *Nudd v. Hobbs*, 17 N. H. 524, 526; *Clement v. Burns*, 43 N. H. 609, 621; *Manufacturing Co. v. Robertson*, 66 N. H. 1, 26, 27, 25 Atl. 718.

In Rhode Island, the owners of land on tide water have no title below high-water mark, but by long usage, apparently sanctioned by a colonial statute of 1707, they have been accorded the right to build wharves or other structures upon the flats in front of their lands, provided they do not impede navigation, and have not been prohibited by the legislature; and they may recover damages against one who, without authority from the legislature, fills up such flats so as to impair that right. *Ang. Tide Waters*, (2d. Ed.) 236, 237; *Folsom v. Freeborn*, 13 R. I. 200, 204, 210. It would seem, however, that the owner of the upland has no right of action against any one filling up the flats by authority of the state for any public purpose. *Gerhard v. Commissioners*, 15 R. I. 334, 5 Atl. 199; *Clark v. City of Providence*, 16 R. I. 337, 15 Atl. 763.

In Connecticut, also, the title in the land below high-water mark is in the state. But by ancient usage, without any early legislation, the proprietor of the upland has the sole right, in the nature of a franchise, to wharf out and occupy the flats, even below low-water mark, provided he does not interfere with navigation; and this right may be

conveyed separately from the upland, and the fee in flats so reclaimed vests in him. *Society v. Halstead*, 58 Conn. 144, 150-152, 19 Atl. 658; *Prior v. Swartz*, 62 Conn. 132, 136-138, 25 Atl. 398. The exercise of this right is subject to all regulations the state may see fit to impose, by authorizing commissioners to establish harbor lines or otherwise. *State v. Sargent*, 45 Conn. 358. But it has been intimated that it cannot be appropriated by the state to a different public use without compensation. *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. 561.

In New York, it was long considered as settled law that the state succeeded to all the rights of the crown and parliament of England in lands under tide waters, and that the owner of land bounded by a navigable river within the ebb and flow of the tide had no private title or right in the shore below high-water mark, and was entitled to no compensation for the construction, under a grant from the legislature of the state, of a railroad along the shore between high and low water mark, cutting off all access from his land to the river, except across the railroad. *Lansing v. Smith*, 4 Wend. 9, 21; *Gould v. Railroad Co.*, 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523, 528; *People v. Canal Appraisers*, 33 N. Y. 461, 467; *Langdon v. Mayor, etc., of New York*, 93 N. Y. 129, 144, 154-156; *Mayor, etc., of New York v. Hart*, 95 N. Y. 443, 450, 451, 457; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251, 260, 8 N. E. 548. The owner of the upland has no right to wharf out without legislative authority; and titles granted in lands under tide water are subject to the right of the state to establish harbor lines. *People v. Vanderbilt*, 26 N. Y. 287, and 28 N. Y. 396; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71. The law of that state, as formerly understood, has been recently so far modified as to hold—in accordance with the decision in *Buccleuch v. Board of Works*, L. R. 5 H. L. 418, and contrary to the decisions in *Gould v. Railroad Co.*, above cited, and in *Stevens v. Railroad Co.*, 34 N. J. Law, 532—that the owner of land bounded by tide water may maintain an action against a railroad corporation constructing its road, by authority of the legislature, so as to cut off his access to the water. *Williams v. Mayor, etc., of New York*, 105 N. Y. 419, 436, 11 N. E. 829; *Kane v. Railroad Co.*, 125 N. Y. 164, 184, 26 N. E. 278; *Rumsey v. Railroad Co.*, 133 N. Y. 79, 30 N. E. 654, and 136 N. Y. 543, 32 N. E. 979.

The law of New Jersey upon this subject was recognized and clearly stated in a recent judgment of this court, in which a grant by commissioners, under a statute of the state, to a railroad corporation, of a tract of land below high-water mark, was held to preclude a city

from continuing, over the flats, a highway dedicated to the public by the owner of the upland. "In the examination of the effect to be given to the riparian laws of the state of New Jersey," said Mr. Justice Matthews, speaking for the court, "it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the state, were, according to its laws, the property of the state as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the constitution upon congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the state, representing the public sovereignty and interest, and of the owners of land bounded by high-water mark." "The nature of the title in the state to lands under tide water was thoroughly considered by the court of errors and appeals of New Jersey in the case of *Stevens v. Railroad Co.*, 34 N. J. Law, 532. It was there declared (page 549) 'that all navigable waters within the territorial limits of the state, and the soil under such waters, belong, in actual propriety, to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark.' It was therefore held, in that case, that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide water, below high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water; and that, without making compensation to him for such loss." *Hoboken v. Railroad Co.*, (1887,) 124 U. S. 656, 688, 690, 691, 8 Sup. Ct. 643.

The arguments on both sides of that proposition, upon general principles, as well as under the law of New Jersey, are nowhere more strongly and fully stated than by Chief Justice Beasley, delivering the opinion of the majority of the court, and by Chancellor Zabriskie, speaking for the dissenting judges, in *Stevens v. Railroad Co.*, above cited, decided in 1870. Two years later, Chancellor Zabriskie recog-

nized it as settled by that case "that the lands under water, including the shore on the tide waters of New Jersey, belong absolutely to the state, which has the power to grant them to any one, free from any right of the riparian owner in them." *Pennsylvania R. Co. v. New York & L. B. R. Co.*, 23 N. J. Eq. 157, 159. See, also, *Railroad Co. v. Yard*, 43 N. J. Law, 632, 636; *American Dock Co. v. Trustees of Public Schools*, 39 N. J. Eq. 409, 445.

In Pennsylvania, likewise, upon the Revolution, the state succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them. *Rundle v. Canal Co.*, 14 How. 80, 90; *Gilman v. Philadelphia*, 3 Wall. 713, 726. But, by the established law of the state, the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it. *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 30, 31; *Wainwright v. McCulloch*, 63 Pa. St. 66, 74; *Zug v. Com.*, 70 Pa. St. 138; *Philadelphia v. Scott*, 81 Pa. St. 80, 86; *Wall v. Harbor Co.*, 152 Pa. St. 427, 25 Atl. 647.

In Delaware, as has been declared by its supreme court, "all navigable rivers within the state belong to the state, not merely in right of eminent domain, but in actual propriety." *Bailey v. Railroad Co.*, 4 Har. (Del.) 389, 395. And see *Willson v. Marsh Co.*, 2 Pet. 245, 251.

In Maryland, the owner of land bounded by tide water is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved. *Casey v. Inloes*, 1 Gill, 430; *Baltimore v. McKim*, 3 Bland, 453; *Goodsell v. Lawson*, 42 Md. 348; *Garitee v. Mayor, etc., of Baltimore*, 53 Md. 422; *Horner v. Pleasants*, 66 Md. 475; 7 Atl. 691; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 675, 684, 3 Sup. Ct. 445, and 4 Sup. Ct. 15, in which the question was who was the riparian owner, and as such entitled to wharf out into the Potomac river, in the District of Columbia, under the authority to do so expressly conferred under the laws of Maryland in force in the District. This court, speaking by Mr. Justice Curtis, in affirming the right of the state of Maryland to protect the oyster fishery within its boundaries, said: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the state on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the state,

or the sovereign power which governed its territory before the declaration of independence; but this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish,—as well shellfish as floating fish.” *Smith v. Maryland*, 18 How. 71, 74.

The state of Virginia was held by this court, upon like grounds, to have the right to prohibit persons not citizens of the state from planting oysters in the soil covered by tide waters within the state; Chief Justice Waite saying: “The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States.” *McCready v. Virginia*, 94 U. S. 391, 394. In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tide waters has the title to ordinary low-water mark, and the right to build wharves, provided they do not obstruct navigation. 5 Op. Attys. Gen. 412, 435-440; *French v. Bankhead*, 11 Grat. 136, 159-161; *Hardy v. McCullough*, 23 Grat. 251, 262; *Norfolk City v. Cooke*, 27 Grat. 430, 434, 435; *Garrison v. Hall*, 75 Va. 150.

In North Carolina, when not otherwise provided by statute, the private ownership of land bounded by navigable waters stops at high-water mark, and the land between high and low water mark belongs to the state, and may be granted by it. *Hatfield v. Grimstead*, 7 Ired. 139; *Lewis v. Keeling*, 1 Jones, (N. C.) 299, 306. The statutes of that state, at different periods, have either limited grants of land bounded on navigable waters to high-water mark, or have permitted owners of the shore to make entries of the land in front, as far as deep water, for the purpose of a wharf; and any owner of the shore appears to have the right to wharf out, subject to such regulations as the legislature may prescribe for the protection of the public rights of navigation and fishery. *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277, and 5 Ired. 118; *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541; *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411; *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281.

In South Carolina, the rules of the common law, by which the title in the land under tide waters is in the state, and a grant of land

bounded by such waters passes no title below high-water mark, appear to be still in force. *State v. Pacific Guano Co.*, 22 S. C. 50; *State v. Pinckney*, Id. 484.

In Georgia, also, the rules of the common law would seem to be in force as to tide waters, except as affected by statutes of the state providing that "the right of the owner of lands adjacent to navigable streams extends to low-water mark in the bed of the stream." Code Ga. 1882, sections 962, 2229, 2230; *Howard v. Ingersoll*, 13 How. 381, 411, 421; *Alabama v. Georgia*, 23 How. 505; Mayor, etc., of Savannah v. State, 4 Ga. 26, 39; *Young v. Harrison*, 6 Ga. 130, 141.

The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.

4. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions.

The act of 1783, and the deed of 1784, by which the state of Virginia, before the adoption of the constitution, ceded "unto the United States in congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction," to the Northwest Territory, and the similar cession by the state of Georgia to the United States, in 1802, of territory including a great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into states, to be admitted, on attaining a certain population, into the Union, (in the words of the Virginia cession,) "having the same rights of sovereignty, freedom, and independence as the other states," or (in the words of the ordinance of congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original states in all respects whatever;" and that "all the lands within" the territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States. *Charters & Constitutions*, pp. 427, 428, 432, 433; *Clayton's Laws of Georgia*, pp. 48-51; *Acts Cong.* April 7, 1798, c. 28, (1 Stat.

549,) May 10, 1800, c. 50, and March 3, 1803, c. 27, (2 Stat. 69, 229;) Pollard's Lessee v. Hagan, 3 How. 212, 221, 222. * * *

5. That these decisions do not as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the state of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the treaty of Guadalupe Hidalgo of 1848, (9 Stat. 926;) U. S. v. Pacheco, (1864,) 2 Wall. 587; Mumford v. Wardwell, (1867,) 6 Wall. 423; Weber v. Commissioners, (1873,) 18 Wall. 57; Packer v. Bird, (1891,) 137 U. S. 661, 666, 11 Sup. Ct. 210; City and County of San Francisco v. Le Roy, (1891,) 138 U. S. 656, 671, 11 Sup. Ct. 364; Knight v. Association, (1891,) 142 U. S. 161, 12 Sup. Ct. 258.

In U. S. v. Pacheco it was decided that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of congress, of land bounded "by the bay" of San Francisco, did not include land below ordinary high-water mark of the bay, because, as was said by Mr. Justice Field, in delivering judgment: "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark,—the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the appellants." 2 Wall. 590.

The state of California was admitted into the Union in 1850, and, within a year afterwards, passed statutes, declaring that a certain line designated upon a recorded plan should "be and remain a permanent water front" of the city of San Francisco; reserving to the state "its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor," and providing that the city might construct wharves at the end of all the streets commencing with the bay, not exceeding 200 yards beyond that line, and that the spaces beyond, between the wharves, should remain free from obstructions, and be used as public slips. In Weber v. Commissioners it was held that a person afterwards acquiring the title of the city in a lot and wharf below high-water mark had no right to complain of works constructed

by commissioners of the state, under authority of the legislature, for the protection of the harbor and the convenience of shipping, in front of his wharf, and preventing the approach of vessels to it; and Mr. Justice Field, in delivering judgment, said: "Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." 18 Wall. 65, 66.

6. The decisions of this court, referred to at the bar, regarding the shores of waters where the ebb and flow of the tide from the sea are not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of congress relating to such waters.

By the law of England, Scotland, and Ireland, the owners of the banks *prima facie* own the beds of all fresh-water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquae*. Lord Hale, in Harg. Law Tracts, 5; Bickett v. Morris, L. R. 1 H. L. Sc. 47; Murphy v. Ryan, 2 Ir. Com. Law, 143; Ewing v. Colquhoun, 2 App. Cas. 839.

The rule of the common law on this point appears to have been followed in all the original states,—except in Pennsylvania, Virginia, and North Carolina, and except as to great rivers, such as the Hudson, the Mohawk, and the St. Lawrence in New York,—as well as in Ohio, Illinois, Michigan and Wisconsin. But it has been wholly rejected, as to rivers navigable in fact, in Pennsylvania, Virginia, and North Carolina, and in most of the new states. For a full collection and careful analysis of the cases, see Gould, Waters, (2d Ed.) sections 56-78.

The earliest judicial statement of the now prevailing doctrine in this country as to the title in the soil of rivers really navigable, although above the ebb and flow of the tide, is to be found in a case involving the claim of a riparian proprietor to an exclusive fishery in the Susquehanna river, in which Chief Justice Tilghman, in 1807, after observing

that the rule of the common law upon the subject had not been adopted in Pennsylvania, said: "The common-law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now, the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is *no* flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation which has not a flow of the tide, but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches." *Carson v. Blazer*, 2 Bin. 475, 477, 478.

It was because of this difference in the law of Pennsylvania from that of England and of most of the older states, and because the decisions of the supreme court of Pennsylvania upon the subject were deemed binding precedents, that this court, speaking by Mr. Justice Grier, held that riparian owners, erecting dams on navigable rivers in Pennsylvania, did so only by license from the state, revocable at its pleasure, and could therefore claim no compensation for injuries caused to such dams by subsequent improvements under authority of the state for the convenience of navigation; and, also, that by the law of Pennsylvania pre-emption rights to islands in such rivers could not be obtained by settlement. *Rundle v. Canal Co.*, (1852,) 14 How. 80, 91, 93, 94; *Fisher v. Haldeman*, (1857,) 20 How. 186, 194.

By the acts of congress for the sale of the public lands, those lands are to be divided into townships six miles square, unless the line of an Indian reservation, or of land previously surveyed and patented, or "the course of navigable rivers, may render it impracticable," and into sections and quarter sections, bounded by north and south and east and west lines, running to the corners, or, when the corners cannot be fixed, then "to the water course," "or other external boundary;" and it is provided "that all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall be common to both." Acts May 18, 1796, c. 29, sections 2, 9; 1 Stat. 464, May 10, 1800, c. 55, section 3; March 3, 1803, c. 27, section 17; March 26, 1804, c. 35, section 6; Feb. 11, 1805, c. 14; 2 Stat. 73, 235, 279, 313; Rev. St. sections 2395, 2396, 2476.

Those acts also provide that when, in the opinion of the president, "a departure from the ordinary method of surveying land on any

river, lake, bayou or watercourse, would promote the public interest," the land may be surveyed, and sold in tracts of 2 acres in width, fronting on any such water, and running back the depth of 40 acres. Act May 24, 1844, c. 141; 4 Stat. 34; Rev. St. section 2407.

By the ordinance of 1787 for the government of the Northwest Territory, "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy." Charters and Constitutions, 432; Act Aug. 7, 1789, c. 8; 1 Stat. 50. And the acts relating to the territories of Louisiana and Missouri contained similar provisions. Acts March 3, 1811, c. 46, section 12; June 4, 1812, c. 95, section 15; 2 Stat. 666, 747.

In the acts for the admission of the states of Louisiana and Mississippi into the Union it was likewise declared that "the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the United States." Acts Feb. 20, 1811, c. 21, section 3; April 8, 1812, c. 50, section 1; 2 Stat. 642, 703; March 1, 1817, c. 23, section 4; 3 Stat. 349.

In *Withers v. Buckley*, (1857,) 20 How. 84, this court, affirming the judgment of the highest court of Mississippi in 29 Miss. 21, held that this did not prevent the legislature of the state from improving by a canal the navigation of one of those navigable rivers, and thereby diverting without compensation the flow of water by the plaintiff's land; and Mr. Justice Daniel, in delivering judgment, said: "It cannot be imputed to congress that they ever designed to forbid, or to withhold from the state of Mississippi, the power of improving the interior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the state. Could such an intention be ascribed to congress, the right to enforce it may be confidently denied. Clearly, congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister states, necessarily implied and guarantied by the very nature of the federal compact. Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, watercourses, and highways situated within the state." 20 How. 93. See, also, *Bridge Co.*

v. Hatch, 125 U. S. 1, 9-12, 8 Sup. Ct. 811; Monongahela Navigation Co. v. U. S., 148 U. S. 312, 329-333, 13 Sup. Ct. 622.

In *The Genesee Chief*, (1851,) 12 How. 443, in which this court, overruling its earlier decisions, held that the admiralty and maritime jurisdiction of the courts of the United States extended to all public navigable waters, although above the flow of the tide from the sea, Chief Justice Taney, taking the same line of argument as Chief Justice Tilghman in *Carson v. Blazer*, above cited, said that in England, where there were no navigable streams beyond the ebb and flow of the tide, the description of the admiralty jurisdiction as confined to tide waters was a reasonable and convenient one, and was equivalent to saying that it was confined to public navigable waters; but that, when the same description was used in this country, "the description of a public navigable river was substituted in the place of the thing intended to be described, and, under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on after it had ceased, from a change in circumstances, to be the true description of public waters." 12 How. 454, 455.

In *Jones v. Soulard*, (1860,) 24 How. 41, the decision was that a title acquired under the act of June 13, 1812, c. 99, (2 Stat. 748,) to land in St. Louis, bounded by the Mississippi river, included an island west of the middle of the river, then only a sand bar, covered at ordinary high water, and surrounded on all sides by navigable water, but which, after the admission of Missouri into the Union as a state, became, by the gradual filling up of the island and the intervening channel, connected with the shore as fast land. Mr. Justice Catron, indeed, in delivering the opinion, spoke of the rule of the common law that "all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions," as a general and well-settled rule, and applicable to the Mississippi river. 24 How. 65. But, as stated in that opinion, the charter of the city of St. Louis extended to the eastern boundary of the state of Missouri in the middle of the Mississippi river. By the law of Missouri, as theretofore declared by its supreme court, the title of lands bounded by the Mississippi river extended to low-water mark, and included accretions. *O'Fallon v. Daggett*, 4 Mo. 343; *Shelton v. Maupin*, 16 Mo. 124; *Smith v. St. Louis Schools*, 30 Mo. 290. And the only question in *Jones v. Soulard* was of the title, not in the bed or shore of the river, but only in accretions which had become part of the fast land.

The rule, everywhere admitted, that, where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the king or the state as to private persons, and is independent of the law governing the title in the soil covered by the water. Lord Hale, in Harg. Law Tracts, pp. 5, 14, 28; *Rex v. Yarborough*, in the King's bench, 3 Barn. & C. 91, and 4 Dowl. & R. 790, and in the house of lords, 1 Dow. & C. 178, 2 Bligh, N. R. 147, and 5 Bing. 163; *Doe v. East India Co.*, 10 Moore, P. C. 140; *Foster v. Wright*, 4 C. P. Div. 438; *Handly v. Anthony*, 5 Wheat. 374, 380; *Jefferis v. Land Co.*, 134 U. S. 178, 189-193, 10 Sup. Ct. 518; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396; *Minto v. Delaney*, 7 Or. 337.

Again, in *St. Clair Co. v. Livingston*, (1874,) 23 Wall. 46, the right of a riparian proprietor in St. Louis, which was upheld by this court, affirming the judgment of the supreme court of Illinois in 64 Ill. 56, and which Mr. Justice Swayne, in delivering the opinion, spoke of as resting in the law of nature, was the right to alluvion or increase of the upland by gradual and imperceptible degrees. And, as if to prevent any possible inference that the decision might affect the title in the soil under the water, the learned justice, after quoting the opinion in *Jones v. Soulard*, above cited, expressly reserved the expression of any opinion upon the question whether the limit of the land was low water or the middle thread of the river, and repeated the propositions established by the earlier decisions of this court, already referred to: "By the American Revolution the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the states respectively; and new states have the same rights of sovereignty and jurisdiction over this subject as the original ones." 23 Wall. 64, 68. * * *

In *Yates v. Milwaukee*, the material facts appear by the report to have been as follows: The owner of a lot fronting on a river in the city of Milwaukee and state of Wisconsin had built, upon land covered by water of no use for the purpose of navigation, a wharf extending to the navigable channel of the river. There was no evidence that the wharf was an obstruction to navigation, or was in any sense a nuisance. The city council afterwards, under a statute of the state, enacted before the wharf was built, authorizing the city council to establish dock and wharf lines upon the banks of the river, to restrain and prevent en-

croachments upon and obstructions to the river, and to cause the river to be dredged, passed an ordinance declaring this wharf to be an obstruction to navigation, and a nuisance, and ordering it to be abated. The point adjudged was that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation. *Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shepardson*, Id. 384, 4 Wis. 486; *Mariner v. Schulte*, 13 Wis. 692; *Arnold v. Elmore*, 16 Wis. 536. See, also, *Olson v. Merrill*, 42 Wis. 203; *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606. And the only decision of that court which this court considered itself not bound to follow was *Yates v. Judd*, 18 Wis. 118, upon the question of fact whether certain evidence was sufficient to prove a dedication to the public. 10 Wall. 504-506.

7. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the constitution.

In *Weber v. Commissioners*, above cited, Mr. Justice Field, in delivering judgment, while recognizing the correctness of the doctrine "that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," and admitting that in several of the states, by general legislation or immemorial usage, the proprietor of land bounded by the shore of the sea, or of an arm of the sea, has a right to wharf out to the point where the waters are navigable, said: "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters is, in England, in the king, and, in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or as it is termed in the language of the law,

a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise." 18 Wall. 64, 65.

In *Atlee v. Packet Co.*, (1874,) 21 Wall. 389, which arose in Iowa in 1871, Mr. Justice Miller, in delivering judgment, after referring to *Dutton v. Strong, Railroad Co. v. Schurmeir*, and *Yates v. Milwaukee*, above cited, disclaimed laying down any invariable rule as to the extent to which wharves and landing places might be built out into navigable waters by private individuals or municipal corporations, and recognized that a state might, by its legislation, or by authority expressly or impliedly delegated to municipal governments, control the construction, erection, and use of such wharves or landings, so as to secure their safety and usefulness, and to prevent their being obstructions to navigation. 21 Wall. 392, 393. And it was adjudged, following in this respect the opinion of the circuit court in 2 Dill. 479, Fed. Cas. No. 10,341, that a riparian proprietor had no right, without statutory authority, to build out piers into the Mississippi river as necessary parts of a boom to receive and retain logs until needed for sawing at his mill by the water side.

In *Railway Co. v. Renwick*, (1880,) 102 U. S. 180, affirming the judgment of the supreme court of Iowa in 49 Iowa, 664, it was by virtue of an express statute, passed by the legislature of Iowa in 1874, that the owner of a similar pier and boom recovered compensation for the obstruction of access to it from the river by the construction of a railroad in front of it.

In *Barney v. Keokuk*, (1876,) 94 U. S. 324, the owner, under a grant from the United States, of two lots of land in the city of Keokuk and state of Iowa, bounded by the Mississippi river, brought an action of ejectment against the city and several railroad companies and a steamboat company to recover possession of lands below high-water mark in front of his lots, which the city, pursuant to statutes of the state, had filled up as a wharf and levee, and had permitted to be occupied by the railroads and landing places of those companies. The plaintiff's counsel relied on *Dutton v. Strong, Railroad Co. v. Schurmeir*, and *Yates v. Milwaukee*, above cited. 94 U. S. 329, 331. But this court, affirming the judgment of the circuit court of the United States, held that the action could not be maintained, and Mr. Justice Bradley, in delivering judgment, summed up the law upon the subject with characteristic power and precision, saying: "It appears to be the settled law of that state that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the

bed of the river, belongs to the state. This is also the common law with regard to navigable waters, although in England no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so, and especially it is true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus v. Carmichael*, 3 Iowa, 1. The above conclusion was reached, and has always been adhered to in that state. *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Railroad Co.*, 32 Iowa, 106." "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the crown, but, as the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British islands and those of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and, under the like influence, it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell's Lessee*, 16 Pet. 367, *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee*

Chief, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject." 94 U. S. 336-338.

In *St. Louis v. Myers*, (1885,) 113 U. S. 566, 5 Sup. Ct. 640, the court, speaking by Chief Justice Waite, held that the act of congress for the admission into the Union of the state of Missouri, bounded by the Mississippi river, which declared that the river should be "a common highway and forever free," left the rights of riparian owners to be settled according to the principles of state law; and that no federal question was involved in a judgment of the supreme court of the state of Missouri as to the right of a riparian proprietor in the city of St. Louis to maintain an action against the city for extending one of its streets into the river so as to divert the natural course of the water and thereby to injure his property.

In *Packer v. Bird*, (1891,) 137 U. S. 661, 11 Sup. Ct. 210, the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by Mr. Justice Field, as follows: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." 137 U. S. 669, 670, 11 Sup. Ct. 210. And it was accordingly held, affirming the judgment of the supreme court of California in 71 Cal. 134, 11 Pac 873, and referring to the opinion in *Barney v. Keokuk*, above cited, as specially

applicable to the case, that a person holding land under a patent from the United States, confirming a Mexican grant bounded by the Sacramento river, which was navigable in fact, took no title below the high-water mark, either under the acts of congress or by the local law.

In *St. Louis v. Rutz*, (1891,) 138 U. S. 226, 11 Sup. Ct. 337, the court, speaking by Mr. Justice Blatchford, and referring to *Barney v. Keokuk*, *St. Louis v. Myers*, and *Packer v. Bird*, above cited, said: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois." And it was because "the supreme court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi river extends to the middle line of the main channel of that river," that it was decided that a deed of land in Illinois, bounded by the Mississippi river, passed the title in fee in the bed of the river to the middle line of the main channel, and to all islands found in the bed of the river east of the middle of that channel; and, "that being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the state of Missouri, to extend his ownership, by mere accretion, to land situated in the state of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that state." 138 U. S. 242, 250, 11 Sup. Ct. 337.

In the recent case of *Hardin v. Jordan*, (1891,) 140 U. S. 371, 11 Sup. Ct. 808, 838, in which there was a difference of opinion upon the question whether a survey and patent of the United States, bounded by a lake which was not navigable, in the state of Illinois, was limited by the margin, or extended to the center of the lake, all the justices agreed that the question must be determined by the law of Illinois. Mr. Justice Bradley, speaking for the majority of the court, and referring to many cases already cited above, said: "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery,—and cannot be retained or granted out to individuals by the United States. Such title being in

the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers, and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses; state control and ownership therein being supreme, subject only to the paramount authority of congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised." 140 U. S. 381, 382, 11 Sup. Ct. 808, 838. And Mr. Justice Brewer, in beginning the dissenting opinion, said: "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest court furnish the best and the final authority." 140 U. S. 402, 11 Sup. Ct. 808, 838.

In the yet more recent case of *Illinois Cent. R. Co. v. Illinois*, (1892,) which also arose in Illinois, it was recognized as the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce. 146 U. S. 387, 435-437, 465, 474, 13 Sup. Ct. 110.

8. Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that congress has no power to

grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

We cannot doubt, therefore, that congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

9. But congress has never undertaken, by general laws, to dispose of such lands, and the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or *jus privatum*, of the king or his grantee, was, in the phrase of Lord Hale, "charged with and subject to that *jus publicum* which belongs to the kings subjects," or, as he elsewhere puts it, "is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade, and intercourse." Harg. Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the king, in his public and regal character, as the representative of the nation, and in trust for them;" and the title and the dominion of the tide waters, and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established," and, upon the American Revolution, vested absolutely in the people of each state, "for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell's Lessee*, 16 Pet. 367, 409-411. As observed by Mr. Justice Curtis, "This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." *Smith v. Maryland*, 18 How. 71, 74. "The title to the shore and lands under tide water," said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." *Hardin v. Jordan*, 140 U. S. 371, 381, 11 Sup. Ct. 808, 838. And the territories acquired by congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the

tide waters, and the lands under them, are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future states." *Pollard's Lessee v. Hagan*, 3 How. 212, 221, 222; *Weber v. Commissioners*, 18 Wall. 57, 65; *Knight v. Association*, 142 U. S. 161, 183, 12 Sup. Ct. 258.

The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

10. The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States, as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. *Am. St. P.*, 6 *Foreign Relations*, 666; *Barrow, Hist. Oregon*, c. 22; 8 *Stat.* 202, 256. While the right to Oregon was in contest between the United States and Great Britain, the citizens of the one and the subjects of the other were permitted to occupy it under the conventions of 1818 and 1827, (8 *Stat.* 249, 360.) Its boundary on the north was defined by the treaty with Great Britain of June 15, 1846, (9 *Stat.* 869.) So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independent title based on discovery and settlement was equally absolute. *Johnson v. McIntosh*, 8 *Wheat.* 543, 595; *Martin v. Waddell*, 16 *Pet.* 367, 409; *Jones v. U. S.*, 137 *U. S.* 202, 212, 11 *Sup. Ct.* 80.

By the act of 1848, establishing the territorial government of Oregon, "all laws heretofore passed in said territory making grants of land, or otherwise affecting or incumbering the title to lands," were declared to be void; and the laws of the United States were "extended over and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable." Act Aug. 14, 1848, c. 177, section 14, (9 Stat. 329.) The land laws adopted by the provisional government of Oregon, established by the people while the sovereignty was in dispute between the United States and Great Britain, regulated the occupation only. The settlers had no title in the soil. The United States, on assuming undisputed dominion over the territory, owned all the lands therein, and congress had the right to confine its bounties to settlers within just such limits as it chose. The provisions of the general land laws of the United States were not applicable to the Oregon territory. And before 1850 there was no statute under which any one could acquire a legal title from the United States to lands in Oregon. *Lownsdale v. Parrish*, 21 How. 290, 293; *Stark v. Starrs*, 6 Wall. 402; *Davenport v. Lamb*, 13 Wall. 418, 429, 430; *Lamb v. Davenport*, 18 Wall. 307, 314; *Stark v. Starr*, 94 U. S. 477, 486; *Barney v. Dolph*, 97 U. S. 652, 654; *Hall v. Russell*, 101 U. S. 503, 507, 508; *Society v. Dalles*, 107 U. S. 336, 344, 2 Sup. Ct. 672.

The first act of congress which granted to settlers titles in such lands was the Oregon donation act of September 27, 1850, c. 76. That act required the lands in Oregon to be surveyed as in the Northwest Territory; and it made grants or donations of land, measured by sections, half sections, and quarter sections, to actual settlers and occupants. It contains nothing indicating any intention on the part of congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers. 9 Stat. 496; Rev. St. sections 2395, 2396, 2409.

It is evident, therefore, that a donation claim under this act, bounded by the Columbia river, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high-water mark, nor is any such effect attributed to it by the law of the state of Oregon.

The southern part of the territory of Oregon was admitted into the Union as the state of Oregon, "on an equal footing with the other states in all respects whatever," by the act of February 14, 1859, c. 33; and the act of admission provided that "the said state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall

form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States." 11 Stat. 383.

The settlers of Oregon, like the colonists of the Atlantic states, coming from a country in which the common law prevailed, to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law. *Van Ness v. Pacard*, 2 Pet. 137, 144; *Norris v. Harris*, 15 Cal. 226, 252; *Cressey v. Tatom*, 9 Or. 541; *Lamb v. Starr*, Deady, 350, 358, Fed. Cas. No. 8,021.

By the law of the state of Oregon, as declared and established by the decisions of its supreme court, the owner of upland bounding on navigable water has no title in the adjoining lands below high-water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the state; but the state has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public. *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435; *Parker v. Rogers*, 8 Or. 183; *Shively v. Parker*, 9 Or. 500; *McCann v. Navigation Co.*, 13 Or. 455, 11 Pac. 236; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154. See, also, *Shively v. Welch*, 10 Sawy. 136, 140, 141, 20 Fed. 28.

In the case at bar the lands in controversy are below high-water mark of the Columbia river, where the tide ebbs and flows; and the plaintiff in error claims them by a deed from John M. Shively, who, while Oregon was a territory, obtained from the United States a donation claim, bounded by the Columbia river, at the place in question.

The defendants in error claim title to the lands in controversy by deeds executed in behalf of the state of Oregon, by a board of commissioners, pursuant to a statute of the state of 1872, as amended by a statute of 1874, which recited that the annual encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflowed lands belonging to the state, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements, and therefore enacted that the owner of any land abutting or

fronting upon, or bounded by the shore of, any tide waters, should have the right to purchase the lands belonging to the state in front thereof, and that, if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase, and made provisions for securing to persons who had actually made improvements upon tide lands a priority of right so to purchase them.

Neither the plaintiff in error nor his grantor appears to have ever built a wharf or made any other improvement upon the lands in controversy, or to have applied to the state to purchase them. But the defendants in error, after their purchase from the state, built and maintained a wharf upon the part of these lands nearest the channel, which extended several hundred feet into the Columbia river, and at which ocean and river craft were wont to receive and discharge freight.

The theory and effect of these statutes were stated by the supreme court of the state, in this case, as follows: "Upon the admission of the state into the Union, the tide lands became the property of the state and subject to its jurisdiction and disposal. In pursuance of this power, the state provided for the sale and disposal of its tide lands by the act of 1872 and the amendments of 1874 and 1876. Laws 1872, p. 129; Laws 1874, p. 77; Laws 1876, p. 70. By virtue of these acts, the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific ocean, or of any bay, harbor, or inlet of the same, and rivers and their bays in which the tide ebbs and flows, within this state, were given the right to purchase all the tide lands belonging to the state, in front of the lands so owned, within a certain time and upon conditions prescribed, and providing, further, that in case such owner or owners did not apply for the purchase of such tide lands, or, having applied, failed to prosecute the same as provided by law, then that such tide lands shall be open to purchase by any other person who is a resident and citizen of the state of Oregon; but in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property, and sometimes improved by expensive structures, the acts further provided, in such cases, that where the bank owners had actually sold the tide lands, then the purchaser of the tide land from the bank owner, or a previous bank owner, should have the right to purchase from the state. These statutes are based on the idea that the state is the owner of the tide lands, and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey

private interests therein, except such as the state saw fit to give the adjacent owners, and to acknowledge in them and their grantees when they had dealt with such tide lands as private property, subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon, and many titles acquired under them to tide lands. In the various questions relating to tide lands which have come before the judiciary, the validity of these statutes has been recognized and taken for granted, though not directly passed upon." 22 Or. 415, 416, 30 Pac. 154.

The substance and scope of the earlier statute of Oregon of October 17, 1862, (Gen. Laws 1862, p. 96; Hill's Code Or. sections 4227, 4228,) were stated by that court as follows: "It is true the legislature of this state had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves, prior to the acts of 1872 and 1874, *supra*; but, within the purview of our adjudications, it would, as a matter of power, have been equally competent to have given this privilege to others. But this act is not a grant. It simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of. Shively did not avail himself of the license, nor is there any pretense to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to tide lands as uplands on navigable waters, they have exercised the right." 22 Or. 420, 421, 30 Pac. 154.

Upon a review of its prior decisions, the court was of opinion that by the law of Oregon, in accordance with the law as formerly held in New York in *Gould v. Railroad Co.*, 6 N. Y. 522; with the law of New Jersey, as declared in *Stevens v. Railroad Co.*, 34 N. J. Law, 532, and recognized in *City of Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 Sup. Ct. 643; and with the law of the state of Washington, on the other side of the Columbia river, as declared in *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. 539; and upon the principles affirmed in decisions of this court, above cited, and especially in *Hardin v. Jordan*, 140 U. S. 371, 382, 11 Sup. Ct. 808, 838; the authority conferred by the statutes of Oregon upon upland owners on navigable rivers, to construct wharves in front of their land, did not vest any right until exercised, but was a mere license revocable at the pleasure of the legislature until acted upon, and that the state had the right to dispose of its tide lands free from any easement of the upland owner.

The court thus stated its final conclusion: "From all this it appears that, when the state of Oregon was admitted into the Union, the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses; state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself. It can say to what extent it will preserve its rights of ownership in them, or confer them on others. Our state has done that by the legislation already referred to, and our courts have declared its absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, unaffected by any 'legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands,' other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results—if we are to be bound by the previous adjudications of this court, which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred—that the defendants have no rights or interests in the lands in question. Upon this point there is no diversity of judgment among us. We all think that the law, as adjudicated, ought not to be disturbed, independent of other reasons and authorities suggested in its support." 22 Or. 427, 30 Pac. 154.

By the law of the state of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case.

The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title

and the control of them are vested in the sovereign, for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the constitution to the United States.

Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

The donation land claim, bounded by the Columbia river, upon which the plaintiff in error relies, includes no title or right in the land below high-water mark; and the statutes of Oregon, under which the defend-

ants in error hold, are a constitutional and legal exercise by the state of Oregon of its dominion over the lands under navigable waters.

Judgment affirmed.

SEC. 7. FISH.

PEOPLE v. PLATT.

17 Johns. (N. Y.), 195; 8 Am. Dec. 382. (1819)

Indictment for a nuisance. The indictment contained three counts charging the defendants with having erected a dam near the mouth of the Saranac river, up which salmon had been accustomed to run, thereby preventing salmon from going up the stream; that defendants had omitted to make the slopes in their dam, required by the statute, to enable the fish to pass. The defendants claimed under a patent to Zephaniah Platt, dated October 26, 1784, for a tract of land seven miles square, bounded on Lake Champlain, into which the Saranac empties, and embracing that river for the distance of seven miles. This patent contained no other reservations than those of "all mines of gold and silver, salt lakes, springs and mines of salt, and carrying places upon any water communications, which may be found or contained within the limits of the said land, and two small tracts for the use of a minister of the gospel and a public school." It was admitted that the defendants derived a regular title to the mill property and appurtenances, under this patent. The first dam was erected in 1785 or 1786, and was rebuilt in 1797. In 1801 a sluiceway or slope was erected, but the water was so shallow as to prevent the passing of the fish. The Saranac was not a navigable river for any kind of boats or crafts; and even timber could be floated down only in single pieces, and that with much difficulty. The act of 1801, which was reenacted in 1813, and under which the indictment was framed, was entitled an act for the preservation of salmon in certain rivers running into lakes Ontario, Erie and Champlain. It provided that "the owners of mill-dams, or other dams, now erected or made across any of the said rivers or creeks, or across any river or creek running into lakes Ontario, Erie, or Champlain, so as to prevent the usual course of the salmon from going up the said rivers or creeks, shall, within eighteen months from the passing of this act, so alter such mill-dam, or other

dam, by making a slope thereto not exceeding forty-five degrees, and planked in such smooth manner that salmon may easily pass up over into the waters above the dam, on penalty of two hundred dollars, etc., and in case such mill-dam, or other dam, shall not be so altered, as aforesaid, within the time above mentioned for that purpose, such mill-dam, or other dam, shall be deemed a public nuisance, and as such shall be removed in like manner as public nuisances are by law removed."

Verdict for the defendants by consent, subject to the opinion of this court, on a case made, which either party might turn into a special verdict.

SPENCER, C. J. * * * From an examination of the authorities which I have been able to consult, I am satisfied that the defendant has a complete and exclusive ownership of the Saranac, from its confluence with the lake, so far as he has succeeded to the rights of Z. Platt. Lord Hale, in his treatise *de jure maris et brachionum ejusdem*, edited by Mr. Hargrave, pp. 8 and 9, says: "There be some streams or rivers that are private, not only in property and ownership, but also in use, as little streams or rivers, that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for a man or goods, or both, from one inland town to another. Thus," he observes, "the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, and as well above the flowings of the sea as below, and as well where they are become private property as in what parts they are of the king's property, are public rivers, *juris publici*, and therefore all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment and removed." Again, p. 5, he says: "Fresh rivers of what kind soever, do, of common right, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque ad filum aquae*, and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side. And if a man be owner of the land on both sides in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length; with this," he adds, "agrees the common experience." I have extracted fully and

freely from this valuable treatise, because it is universally considered as high authority of itself, and because it defines, with more precision than any other work, what constitutes a public river, and makes the distinction between such as are public and those which are private property. The adjudged cases will, however, bear out all the positions laid down by Lord Hale. In Lord Fitzwalter's case, 1 Mod. 105, the question was, whether the defendant had not the right of exclusive fishing in the river of Wall-fleet. Hale, chief justice, ruled that in the case of a private river, the lord having the soil, is good evidence to prove that he has the right of fishing, and it put the proof on them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all. In the case of Carter v. Murcott, 4 Burr. 2162, Lord Mansfield held that the rules of law were uniform, in rivers not navigable the proprietors of the land have the right of fishing, on their respective sides, and it generally extended *ad filum medium aquae*; but in navigable rivers, the proprietors of the land on each side have it not; the fishing is common, it is *prima facie* in the king and is public. I cannot discover that these principles and distinctions have ever been denied or overruled, and I venture to say that they are of indisputable authority. We perceive, then, that some rivers and streams are wholly and absolutely private property, and that others are private property, subject, nevertheless, to the servitude of the public interest, and in that sense are to be regarded as common highways by water. The distinguishing test between those rivers which are entirely private property, subject to the public use and enjoyment, consists in the fact whether they are susceptible or not of use as a common passage for the public.

In Palmer v. Mulligan, 3 Cal. 319 (2 Am. Dec. 270), this distinction was adopted by Chief Justice Kent. No case or *dictum* has been cited, unless it be those of Stoughton v. Baker, 4 Mass. 522 (3 Am. Dec. 236), and Shaw v. Crawford, 10 Johns. 236, which considers the circumstance that fish generally or salmon, which Lord Hale pronounces not to be royal fish, frequent a river at certain seasons, as having any controlling effect on the question whether the river is to be regarded as private property or liable to the public servitude; on the contrary, we have seen that this circumstance has no influence on the question. It is evident, on looking into the case of Shaw v. Crawford, that the court placed the decision on the fact that the Battenkill had been used for twenty-six years for rafting; and we held that a usage for such a length of time would grow into a public right, especially when the

public interest was so essentially promoted. The observation "that every owner of a mill-dam on a stream which fish from the ocean annually visit, is bound to provide a convenient passage-way for the fish to ascend," was an *obiter dictum* unnecessary to the decision of the cause, and founded entirely on the case of *Stoughton v. Baker*. In that case the supreme court of Massachusetts held that a legislative resolution appointing a committee who were authorized to require the proprietors of certain dams on Neponset river to alter them in such a way as would be sufficient for the passage of shad and alewives at the dams, was a legal proceeding not repugnant to the constitution. The opinion is founded on the ancient and long continued usage of the general court of Massachusetts, to appoint commissioners to locate and describe the site and dimensions of passage-ways for fish; and under the circumstances of the case it was held that the right of the proprietor of the dam was subject to the limitation that a reasonable and sufficient passage should be allowed for the fish. The court, however, expressly say, that any prostration of the dam, not within the limitation, would be an injury to the owner, for which he might appeal to his country and have a remedy; and that if the government in the grant of a mill privilege, expressly or by necessary implication waive this limitation, it would be bound. In the case then under consideration, the court said it would be an unreasonable construction of the grant to admit that by it, all the people were deprived of a free fishery in the river above the dam to which, until the grant, they were unquestionably entitled. Whether in that case the Neponset river was navigable above the dam, is nowhere affirmed or denied; but it is perfectly clear that the court proceeded on local usages and customs, and not upon the general and received doctrines of the common law; for not a single case is referred to, nor is it even asserted that the principles advanced are sanctioned by the English common law; whereas it has been shown that by the common law the property in the river Saranac passed to Zephaniah Platt, and had been transmitted through him to the defendants without any limitation or restriction, and that the fishery itself became vested in the proprietor of the river; it being a conceded fact that the river is unnavigable for boats of any kind; for there is no weight in the circumstance that for a few years past and since 1810, rafts have occasionally been brought down this river, when connected with the fact that the defendant has received a consideration for that privilege. * * *

Zephaniah Platt then, and his assigns gained a complete right to the

exclusive enjoyment of the river in the bounds of his patent, and to take the fish frequenting it. He and those holding under him have enjoyed this right uninterruptedly for more than thirty years and the indictment charges no other offense than that of obstructing the Saranac, by a dam near its mouth. * * *

Judgment for defendants.

CHAPTER XVI.

POWERS.

BURLEIGH v. CLOUGH, *Supra*, p. 389.

PETER v. BEVERLY.

10 *Pet.* (U. S.) 562; 9 *L. Ed.* 522. (1836)

MR. JUSTICE THOMPSON delivered the opinion of the Court:

* * * And this leads, in the next place, to the inquiry, whether George Peter, the surviving executor, has authority to sell the lots in the city of Washington.

With respect to the Dulin farm, no doubt can exist. The testator gives positive directions for that farm to be sold, and the proceeds applied to the payment of his debts. The executors in the sale to Magruder only gave a bond for a deed; the title was not to be given until the purchase money was all paid; and that not having yet been done, no title has been conveyed, and it yet remains subject to be applied to the payment of debts; and a re-sale is necessary in order fully to carry into effect the will of the testator. It is a well-settled rule in chancery in the construction of wills as well as other instruments, that when land is directed to be sold, and turned into money, or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. This is the doctrine of this court in the case of *Craig v. Leslie*, 3 Wheat, 577; and is founded upon the principle, that courts of equity, regarding the substance, and not the mere form of contracts and other instruments consider things directed, or agreed to be done, as having been actually performed. But this principle may not perhaps apply in its full force and extent to the city lots. They are not positively directed by the will to be converted into money; but the sale of them was contingent, and only in aid of the proceeds of the Dulin farm, if a sale of them should become necessary

for the payment of debts. But independent of this principle, there is ample power in the surviving executor to sell. We find, in the cases decided in the English courts, and in the elementary treatises on this subject, no little confusion, and many nice distinctions.

The general principle of the common law, as laid down by Lord Coke, (Co. Lit. 112, b) and sanctioned by many judicial decisions, is, that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. Rep. 553; 2 Johns. Ch. 19.

But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee, is invested with the rents and profits of land, for the sale or use of another; it is still an authority coupled with an interest, and survives. 1 Caine's Ca. in Er. 16; 2 Peere Wms.

In the American cases, there seems to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing, the consequences that might result from an

extinction of the power; and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor Kent, in the case of *Franklin v. Osgood*, 2 Johns. Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts. 3 Atk. 714; 2 Peere Wms. 102. And is adopted and sanctioned by the court of errors in New York, on appeal, in the case of *Franklin v. Osgood*. And Mr. Justice Platt, in that case, refers to a class of cases in the English courts, where it is held, that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell; yet, if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator, that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the supreme court of Pennsylvania, in the case of the *Lessee of Zebach v. Smith*, 3 Binney, 69. The court there considered it as a settled point, that if the authority to sell is given to executors, *virtute officii* a surviving executor may sell; and that the authority given by the will, in that case, to the executors to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favoured in the law.

Although the clause in the will now under consideration, does not name the executors as the persons who are to sell the land, yet it is a power vested in them by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows, as a matter of course, that the testator intended his executors should make the sale, to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his *Treatise on Powers*, page 167, on the authority of a case cited from the year books, lays it down as a general rule, that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of Chancellor Kent, in the case of *Davoux v. Fanning*, 2 Johns Ch. 254. The will, in that case, as in this, directed the real estate to be sold for certain purposes therein specified, but did not

direct expressly by whom the sale should be made; and he held, as Lord Hardwicke did in a case somewhat similar, 1 Atk. 420, that it was a reasonable construction, that the power was given to the executors; that it was almost impossible to mistake the testator's meaning on that point. So, in the present case, it is impossible to draw any other conclusion, than that it was the testator's intention, that the sale should be made by his executors. *Jackson v. Hewitt*, 15 Johns, 349, is a case very much in point, on both questions. That the power in this case, is coupled with an interest, and survives, and that by implication, it is to be executed by the surviving executor. The testator, say the court, in that case, directed that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom; and one of the executors only undertook the execution of the will, and sold the land; and the court held, that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts.

* * *

BOWEN v. CHASE, *Supra*, p. 218.

BLAKE v. HAWKINS.

98 U. S. 315; 25 L. Ed. 139. (1878)

MR. JUSTICE STRONG delivered the opinion of the court.

It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Postlethwaite's Appeal*, 68 Pa. St. 477; *Smith v. Bell*, 6 Pet. 68. Such a method of procedure is, we think, appropriate to the present case.

Mrs. Devereux's will was made on the twenty-third day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or the amount

of her property between the date of her making the will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her death, she had when she made her testamentary disposition. At that time her personal property consisted of her household furniture, her carriage and horses, a growing crop upon a farm she was cultivating jointly with her grandson John Devereux, a small sum of cash in hand, some petty debts due to her, and about sixty slaves. The slaves, as appears in a subsequent appraisement, constituted the principal part in value, very nearly, if not quite, nine-tenths of the whole. In addition to this, she owned a house and lot in Chapel Hill, which she directed to be sold; and she had a power to appoint the unappropriated balance of a fund of \$50,000 then in the hands of her son, Thomas P. Devereux. Such was the property of which she attempted to make a disposition. Her will commenced with a declaration of her intention "thereby to execute all powers vested in (her) and enacted in any deed or deeds theretofore executed, particularly those powers created in her favor by two certain deeds settling and assuring the estate of her late brother, George Pollock, to (her) son, Thomas P. Devereux, dated some time in the month of July, in the year of our Lord eighteen hundred and thirty-nine, and executed by her late husband and herself." This was followed by her testamentary dispositions. By the first five she gave five legacies of \$4,000 each to five several charitable institutions, to each an equal sum. By the sixth item she bequeathed \$500 to her executors for a charitable purpose. By the eighth she bequeathed \$7,500 to her son, Thomas P. Devereux, to apply the income annually to the payment of certain annuities and charities therein specified; and by the twelfth item she bequeathed \$500 for another specified charity. The will contains no other gifts of pecuniary legacies. The aggregate of these is \$28,500. Special dispositions are made of her slaves, horses, cattle, hogs, crops, and farming utensils, and of the proceeds of the sale of her house and lot in Chapel Hill,—generally, indeed, of all that she possessed in her own right.

Whether this will was an execution of the power reserved to her by the deed to her son, referred to in the introductory clause,—whether it was an appointment of so much of the sum of \$50,000 made subject to her appointment by the deed, as remained undisposed of by her, is the most important question we have now to consider. It must be admitted that the avowal by the testatrix in the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subse-

quent dispositions. A previously expressed intention may serve to explain language afterwards used, and show what its meaning is; but it is one thing to intend a future act, and quite another to carry out that intention. While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose. Prior to the English Statute of Wills (1 Vict. c. 26),—which, so far as it relates to appointments, by will, has been enacted in North Carolina,—certain things had been generally accepted as indicative of an intention to execute a power, and as sufficient indications. As expressed in repeated decisions, these were: first, some reference to the power in the will or other instrument; second, some reference to the power or subject over which the power extends; and, third, where the provisions of the will or other instrument executed by the donee of the power would be ineffectual or a mere nullity, or would have no operation if not an execution of the power. The first of these indications, however, must be understood as a reference to the power in the dispositions actually made. In *Lowson v. Lowson*, (3 Bro. C. C. 272), a will expressed to have been made in pursuance of a power which the testator had, was held by the Lord Chancellor not to have been an execution thereof, because the subsequent dispositions were apparently applicable only to his own estate. It may be remarked that Sir Edward Sugden expresses doubts of the correctness of this decision, for the reasons given by Lord Thurlow; but he still lays down the rule, that “although a will be expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will.” Sugden, *Powers* (2d Am. ed.), 364. On the other hand, if the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument.

Turning now to the will we have before us, two things are evident. The first is, that the testatrix did not intend that the pecuniary legacies given for charitable purposes, and to pay annuities, should be satisfied out of her own personal property; and the second is, that she did intend that those legacies should be paid. Substantially all her own property she devoted to other uses. Her horses, cattle, hogs, &c.,

crops and farming utensils, her carriage, wagon, and all personal property except negroes, in the possession of her grandson, John Devereux, she directed to be sold, and the proceeds applied to the payment of her debts; and she appears to have doubted whether they would be sufficient. Her house and lot in Chapel Hill she ordered to be sold, and directed the sum paid for it to be invested in some productive stock, ordering, however, a payment out of it, and out of the funds arising from the sale of some negroes, to satisfy an annuity of \$150 during a life or lives. By these specific appropriations she negated any right to apply these funds to the payment of the pecuniary legacies mentioned in the first, second, third, fourth, fifth, sixth, eighth, and twelfth items in the will. Nothing of her own personal property, of any considerable value remained, except her slaves. Six of them she specifically bequeathed. One she ordered to be sold, devoting the proceeds to the distribution of tracts and religious books, and three others were directed to be sold at private sale, and a portion of the avails, if not all, she appropriated to the payment of an annuity. The remainder of her slaves she provided might be taken at a valuation by her son-in-law and grandson, upon their giving bonds for payment of the appraised value in ten annual instalments. These bonds, of course, could not be applied to the discharge of the pecuniary legacies as they fell due. Thus it appears that while she gave pecuniary legacies amounting in the aggregate to more than \$28,000, she carefully withdrew from any positive application to their payment the personal estate she owned in her own right. It seems necessarily to follow that, if she intended those legacies to be paid at all, she intended them to be paid out of the fund over which she had the power of appointment. This appears from the testamentary dispositions themselves, independent of any reference to the intention to execute her power, avowed in the introductory clause in the will. And that avowal tends to support the conclusion. It is significant, also, that after she had made a specific disposition of all her own property inconsistent with any application of it to paying those legacies, she refers to their payment again, and uses this language: "Should it appear at my decease that the bequests exceed the amount of funds left, my will is that the first five only shall be curtailed, until brought within the limits of the assets." This provision was a reasonable one, in view of the uncertainty there was in regard to the amount remaining of the funds of which she had the power of appointment. We conclude, therefore, that Mrs. Devereux's will was an execution of the power, and an appointment of the

fund to her executors. It converted the fund into her own estate, at least to the extent of \$28,500, if there was so much of it remaining.

* * *

WARNER et al. v. CONNECTICUT MUT. LIFE INS. CO.

109 U. S. 357; 27 L. Ed. 962; 3 Sup. Ct. 221. (1883)

Bill to foreclose a mortgage, and cross-bill to have the mortgage set aside. The appellees filed the bill as plaintiffs in the court below, against the appellants and one Charles G. Beers, their brother, and against other parties, to foreclose a mortgage on real estate in Chicago. The appellants filed in that suit their cross-bill, setting forth their title to the mortgaged property, alleging that the mortgage was a cloud upon it, and praying a decree for the discharge of the mortgage. The controversy arose on the following facts:

On the 24th February, 1869, one Cyrenius Beers borrowed of the insurance company, appellees, \$20,000, and executed and delivered to them his bond conditioned for the payment of that sum, with interest, payable semi-annually, at the rate of eight per cent per annum. On the same day Beers and Mary Beers, his wife, duly executed and delivered the mortgage in controversy, to secure the payment of that debt. The title to the mortgaged estate was in the wife, and was so described in the mortgage. In the following October the wife died, leaving a will, which was duly admitted to probate in March, 1872, and of which the following is a copy:

"I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age and sound mind, in view of the uncertainty of human life, do make, publish, and declare this my last will and testament.

"First. I order all of my debts to be paid including the expenses of my funeral and last illness.

"Second. I give and bequeath to my husband, Cyrenius Beers, all the estate both real, personal, and mixed, of which I die seized or possessed, to be held by him in trust for the following uses, purposes, and trusts, and none other; that is to say: To receive the rents, income, and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, share and share alike, to them, their heirs and assigns forever. But provided that said Cyrenius Beers may incurber

the same by way of mortgage or trust deed or otherwise, and renew the same, for the purpose of raising money to pay off any and all incumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property. But provided further, that the said Cyrenius Beers may, in his discretion, during his life, sell and dispose of any or all the real estate of which I may die seized or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the incumbrances upon any of the property of which I may die seized and possessed, and the remainder, over and above what may be required to pay the indebtedness upon said property, the same being now incumbered, to reinvest in such way as he may see proper, and from time to time sell and reinvest, such reinvestment to continue to be held in trust the same as the estate of which I may die possessed; that is to say, the said Cyrenius Beers only to have the use during his life of said estate, with the right of sale and to incumber and reinvest, the remainder after his death to go to my children and their heirs forever.

"Third, I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided, as such executor." * * *

MATTHEWS, J. * * * It is further said, however, on the part of the appellants, that the agreement of February 24, 1874, cannot be sustained in support of a continuation of the mortgage lien, as an execution of the powers conferred by the will of Mary Beers, because it does not appear that it was so intended by Cyrenius Beers, the donee of those powers. It is argued that the agreement of extension makes no reference either to the power or to the property of the testatrix, which is the subject of the power; that every provision contained in it can have its full operation and effect; that is, all that it professes to do or provide for can be done, according to its full tenor, without referring the act to the power, and by referring it solely to the individual interest of Cyrenius Beers, as the debtor of the appellee.

This, however, on an examination of its terms, will appear to be an erroneous view of the true meaning and legal effect of the agreement of extension. It recites the indebtedness of Cyrenius Beers to the appellee as then due and unpaid; that he had applied to them to extend the time for the payment of the principal sum; that Cyrenius Beers and Mary, his wife, had executed and delivered their deed of mortgage to secure the payment thereof. It is thereupon witnessed that the Connecticut Mutual Life Insurance Company doth thereby extend and

postpone the time of payment of the principal sum until February 24, 1879, interest to be paid thereon at the rate of 9 per centum per annum; and in consideration thereof Cyrenius Beers agrees to pay the principal sum on the day named therefor, and the interest thereon as stipulated; it being understood that, upon a failure to pay any instalment of interest, the whole of the principal sum shall thereupon become due, and may be collected without notice, together with all arrearages of interest. It is also understood and agreed between the parties that nothing in the agreement shall operate to discharge or release Cyrenius Beers from his liability upon the bond originally given for the payment of the debt, "but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond." It is also expressly understood and agreed between the parties that in the event of failure on the part of Cyrenius Beers "to fulfill, keep, and promptly perform, as well in spirit as in letter, the covenants, in said mortgage contained, given by said Cyrenius Beers to said company, then, at the election of the said Company, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding."

Taking the instrument in all its parts, and looking at its entire scope and purpose, it must be admitted that, notwithstanding its omission of any direct and express stipulation of that character, its meaning and legal effect are to continue in force, so far as the parties to it had lawful authority to do so, the covenants and lien of the mortgage as security for the payment of the original debt, with the interest reserved at the increased rate until the expiration of the extended time of payment. This effect was undoubtedly intended by the parties, and this intention could not take effect except by virtue of the powers contained in the will of Mary Beers. Cyrenius Beers, as debtor, had no power to continue the mortgage in force nor as tenant for life to renew it as a mortgage in fee. This is a demonstration, therefore, that the instrument must be treated as an execution of those powers, because, if it cannot otherwise operate according to the intention of the parties, it must be referred to the power which alone can make it effectual in all its provisions.

The rule applicable in such cases, it is claimed, is that deduced as the doctrine of Sir Edward Clere's Case, 6 Report 17b, as stated by 1 Sugd. Powers, (7th London Ed.) 417, that "where the disposition,

however general it may be, will be absolutely void if it do not inure as an execution of the power, effect will be given to it by that construction." Mr. Chance, however, says:

"There are, indeed, in the case *dicta* apparently to this effect; that if the instrument refer not to the power, and can have some effect by means of the interest of the party, though not all the effect which the words seem to import, still the instrument shall not operate as an execution of the power, the intention being thus contravened. It appears quite clear, however, at this day, and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries, that the rule is not thus confined; indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case as well as in the other? What rule of law or construction would be thereby violated?" 2 Chance, Powers, 72, section 1597 (London Ed. 1831).

And Sir Edward Sugden said:

"And notwithstanding Sir Edward Clere's Case, an intent, apparent upon the face of the instrument, to dispose of all the estate would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not otherwise be satisfied." 2 Sugd. Powers. (7th London Ed.) c. 6, 8, p. 412.

In the present case, as we have seen, the legal effect and meaning of the instrument cannot be satisfied without treating it as an execution of the powers under the will, for Cyrenius Beers, merely as debtor, as mortgagor, and as owner of the life estate under the will of his wife, could not lawfully agree to keep in force and renew a mortgage upon the estate of which the appellants were devisees in remainder in fee.

The Supreme Court of Illinois in the case of Funk v. Eggleston, 92 Ill. 515, had the question under consideration, and in a learned opinion, in which a large number of authorities, both English and American, is reviewed, discarded even the modified English rule of later date, and adopted that formulated by Mr. Justice Story in *Blagge v. Miles*, 1 Story, 426, as follows:

"The main point is to arrive at the intention and object of the donee of the power in the instrument of execution, and, that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be ap-

parent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts, or deeds demonstrating the intention."

The rule as adopted by this court was tersely stated by Mr. Justice Strong in delivering its opinion in *Blake v. Hawkins*, 98 U. S. 315, 326, in this form:

"If the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument."

In the case of *Munson v. Berdan*, 35 N. J. Eq. 376, it is said:

"It is sufficient if the act shows that the donee had in view the subject of the power."

And in *White v. Hicks*, 33 N. Y. 383, 392, Denio, C. J., said:

"This doctrine proceeds upon the argument that by doing a thing which, independently of the power, would be nugatory, she (the donee of the power) conclusively evinced her intention to execute the power."

And in *Sewall v. Wilmer*, 132 Mass. 131, 134, the supreme judicial court of Massachusetts, in reference to a will made in Maryland, which was the domicile of the testatrix, but the provisions of which related to both real and personal estate situated in Massachusetts, held it to be a valid execution of a power contained in the will of her father, whose domicile was in that state, although it would have been otherwise held in Maryland. Gray, C. J., said:

"But in this commonwealth the decisions in England since our revolution, and before the St. of 7 Wm. IV. and 1 Vict. c. 26, 27, have not been followed; the court has leaned towards the adoption of the rule enacted by that statute as to wills thereafter made in England, namely, that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a contrary intention should appear by his will; and it has been adjudged that the mere facts that the will relied on as an execution of the power does not refer to the power, nor designate the property subject to it, and that the donee of the power has other property of his own upon which his will may operate, are not conclu-

sive against the validity of the execution of the power; but that the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it."

We cannot doubt that Cyrenius Beers, in the agreement of February 24, 1874, intended to exert whatever power had been conferred upon him by the will of his wife to continue in force the mortgage to the appellee as an incumbrance upon her estate, for the reason that it is upon that supposition alone that it can have its due legal effect, *ut res magis valeat quam pereat*; and, by force of the rules which we have seen ought to govern in such cases, we hold that if the agreement as made is within the scope of the power, it must be regarded as a valid execution of it. * * *

SIR EDWARD CLERE'S CASE, *Supra*, p. 382.

CHAPTER XVII.

NATURAL RIGHTS.

- Section 1. General Nature.
- Section 2. Light and Air.
- Section 3. Natural Watercourses.
- Section 4. Surface Water.
- Section 5. Underground Water.
- Section 6. Support of Land.

SEC. 1. GENERAL NATURE.

SCRIVER v. SMITH.

100 N. Y. 471; 53 Am. Rep. 224; 3 N. E. 675. (1885)

EARL, J. * * * But there is still another view which may be taken of this case. Every owner of land through which a natural stream of water flows has the right to have it flow from his land unobstructed in its natural channel, unless such right has been curtailed by grant or adverse possession. This is said to be a natural right *publici juris*. The learned counsel for the defendant contends that this right rests upon an easement which an upper owner upon a stream has in the lands below him for the passage of the water over such lands in its natural channel, and his contention has some authority for its support. *Cary v. Daniels*, 5 Metc. 236; *Prescott v. Williams*, 5 Metc. 429; s. c., 39 Am. Dec. 688. Such rights have some semblance to easements, and no harm or inconvenience can probably come from classifying them as such for some purpose. But they are not in fact real easements. Every easement is supposed to have its origin in grant or prescription which presupposes a grant, and it is quite absurd to suppose that the owner of land at the head of a stream has an easement by grant or prescription for its flow over all the land of the riparian owners for many miles to its mouth. Would any of the usual covenants in a deed be violated because a natural stream of water flowed through the land and the upper owners therefore had an easement in

such land? Clearly not. In Washburn on Easements, 19, it is said: "The term 'natural easements,' as applicable especially to the case of flowing water, is often made use of by courts of common law and is not likely to mislead the reader, inasmuch as the context usually shows in what sense the term is employed. But as will appear hereafter that an easement when technically considered is an interest which one man has in another's estate by grant or its equivalent, prescription, it seems at first thought to be inconsistent to characterize what belongs to an estate as inseparably incident thereto and forming part and parcel thereof, by the name of easement or servitude. It may be in many respects, and perhaps most respects, like an easement and may be treated accordingly, and yet will hardly come within the requirements of what constitutes an easement at common law." Again at page 276 the learned author speaking of the flow of water in natural streams, says: "The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state unaffected by the tortious acts of a neighboring land-owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." In Angell on Water-Courses, 90, it is said: "The right to the use of the flow of water in its natural course and to the maintenance of its fall on the land of the proprietor is not what is called an easement, because it is inseparably connected with and inherent in the property in the land; it is a parcel of the inheritance and passes with it." In *Stokoe v. Singers*, 8 Ell. & Bl. 31, Erle, J., said: "The right to the natural flow of water is not an easement, but a natural right." In *Johnson v. Jordan*, 2 Metc. 234, Shaw, C. J., speaking of the right of an owner of land through which a stream of water flowed, to have the water come to and pass from his land unobstructed, said: "It is inseparably annexed to the soil and passes with it, not as an easement, not as an appurtenance, but as parcel." Easements proper are incorporeal rights, but the right to have water flow in its natural channel is a corporeal right.

So the right to have the water flow to and from the land conveyed to the plaintiffs was a corporeal right, and part and parcel of the premises granted and was therefore covered by the deed. The plaintiffs were disturbed in the possession of the parcel thus granted by Douglass under his paramount right, and in part evicted therefrom, and therefore there was a breach of the covenant for quiet enjoyment.

They bought a water power. That was a corporeal right covered by the deed, and they were evicted from a portion thereof.

These views are in no degree in conflict with anything decided in the case of *Green v. Collins*, 86 N. Y. 246; s. c., 40 Am. Rep. 531. There the easement in question was an artificial one, an incorporeal hereditament, and it was held that because it did not belong to the grantor it did not pass as appurtenant to the land granted, was not covered by the deed, and hence was not within the scope of the covenant for quiet enjoyment. That case rests upon ample authority, and the views herein expressed show it cannot apply to such a case as this. * * *

SEC. 2. LIGHT AND AIR.

GUEST v. REYNOLDS.

68 Ill. 478; 18 Am. Rep. 570. (1873)

BRESE, C. J. This was an action on the case, brought to the Circuit Court of Cook County, to recover damages for an alleged obstruction, by defendants, of the free use of the light and air passing laterally over the premises of defendants to plaintiff's premises.

The declaration contains two counts, in substance as follows: Plaintiff, after averring his residence on a particular lot, 73 South Sangamon Street, in Chicago, in a house having doors, windows and views of the street, through which light, air and views had and ought to enter into the dwelling-house, and the views should not have been obstructed, and ought to be used by plaintiff and his family, for the wholesome use and occupancy thereof, avers: Yet, the said defendants, well knowing the premises, but contriving, wrongfully and unjustly intending to injure the plaintiff and his family, and to deprive them of the use of said doors, windows and views, and to incommode him in the use and enjoyment thereof, and to annoy plaintiff in his use and possession and enjoyment of said premises, on, etc., wrongfully and injuriously caused and erected and raised a high board fence, and caused to be erected, constructed and raised on the north part of said lot and dwelling-house and lot, and adjoining thereto, a high board obstruction. The obstruction was made and constructed next to the north line of the house and lot, No. 73 South Sangamon Street. It was made upon the south line of an alley next north of said house

and lot, and close adjoining, and was so made and constructed, and is now standing, and in such close proximity that it hides the original fences. It nowhere protects the alley, and it is so raised and constructed, and of such height made at certain places in its construction, and so near to the windows, that it wrongfully and injuriously darkens the said dwelling-house, obstructs the light to said windows, and is so made as to obstruct the view to said street, and in fact is so constructed, wrongfully and injuriously, as aforesaid, as to interfere with the use of, and the light and air and views from said dwelling-house, and thereby renders said dwelling-house of but little use to plaintiff and his family; and defendants have wrongfully and injuriously kept and continued said high board fence obstruction, etc., by them erected, as aforesaid, for a long space of time, to wit, etc.; and the same is now continued, by means of which premises, the said dwelling-house, with its appurtenances, are greatly darkened and injured, and they continued darkened and injured, and the light, air and views were and are hindered and prevented from coming into, and through the said windows, into said dwelling-house, and the same hath thereby been rendered, and is close, uncomfortable, unwholesome and measurably unfit for habitation, and plaintiff and his family have thereby been, and still are, greatly annoyed and incommoded in the use, possession and enjoyment of said dwelling-house and lot, with the appurtenances, to wit, etc., to the damage, etc.

The second count, omitting the formal and introductory parts, avers: Yet the said defendants, well knowing the premises, but continuing, etc., and intending to injure and prejudice plaintiff and to deprive him of the use, benefit and enjoyment of the said windows, and to annoy and incommode him in the use, possession and enjoyment of said dwelling-house, with the appurtenances, heretofore, to wit, etc. (with a *continuando*), wrongfully, maliciously, willfully and injuriously greatly darkened said windows, and hindered and prevented the light and air from coming and entering into and through said windows into said dwelling-house and premises, and the same have thereby been rendered and are uncomfortable, unwholesome and unfit for habitation, and the plaintiff thereby has been and is greatly annoyed and incommoded in the use, possession and enjoyment of said dwelling-house and premises, with the appurtenances, to his damage, etc. The plea was, not guilty.

Under instructions from the court, the plaintiff had a verdict for eight hundred and thirty-eight dollars, a portion of which was remitted and judgment rendered for five hundred dollars.

To reverse this judgment defendants appeal.

We have copied, literally, the counts of the declaration, in order that the precise nature of the action may be seen and understood.

Appellee claims that the gravamen of the action is not for obstructing light and air and views, but it is for erecting an unsightly fence and of offensive materials. The logic of the narr. certainly is, that the plaintiff having the right to use the light and air and views, he has been deprived of the same by the erection of the fence, and by which erection his dwelling has been darkened, rendered unwholesome and unfit for habitation. The latter is alleged as a consequence of the erection of the fence, and the right to build the fence is denied, because of plaintiff's right to have free course for light and air and an unobstructed view from his windows. The gravamen of the action most clearly is, the obstruction of light, air and view, the rest being consequences, merely, of the obstruction. It is not alleged, the materials which composed the obstruction—the fence—were of an offensive nature, or that the air, in passing through or over the fence, became charged with offensive matter. The averment simply is, by erecting a fence the passage of light and air has been obstructed, by which the dwelling has been darkened, rendered unwholesome and unfit for habitation.

In this view of the nature of the action, the first question to be determined is, were defendant's lots, on the south boundary of which they erected this fence, servient lots; in other words, had the plaintiff any right to the passage of light and air laterally over defendant's lots, to plaintiff's doors and windows, and to an unobstructed view of an adjacent street? If he had, whence does he derive it? This is for him to show, and he has not shown it. He shows no right by prescription, by use for twenty years, if such use could be available, and no grant from any one. The owner of the premises erected the dwelling-house occupied by plaintiff within two feet of the south line of defendant's premises. We have been referred to no law forbidding defendants from erecting a fence on the line of their own land. Admit the erection does darken the rooms of his neighbor—that it does render them close and uncomfortable, and annoy and incommode him, the defendants have only exercised a right belonging to them, by building the fence.

This is not a case of ancient lights. The plaintiff insists it is for a nuisance, arising out of a violation of the maxim, "*sic utere tuo ut alienam non laedas.*" It is not denied, that, by the common law, an action on the case lies for a nuisance to the habitation or estate of

another, many instances of which are readily found in the books; and among the many hundred, one is now before us, in 10 Ad. & Ellis, 590, *Hight v. Thomas*, 37 E. C. L. Rep. 182, and is germane to this case. That was an action for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about the house. The defendant pleaded the enjoyment, as of right, for twenty years of a mixen (compost heap or dunghill) on his land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen. This plea was traversed, and there was a verdict for the defendant. In the King's bench the plea was held bad, and the plaintiff entitled to judgment, as it did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had in fact been used to pass beyond the limits of defendant's own house.

The law unquestionably is, if a man erect anything offensive so near the house of another, that it becomes useless thereby, case lies, as a lime kiln, a dye-house, a tallow furnace, a privy, a brewhouse, a tan vat a smelting-house and the like. But it does not lie if a man builds a house and makes cellars on his soil, whereby a house newly built on the adjoining soil falls down, so, if by such building he stops lights newly made in the house of another, though the lights have continued for thirty or forty years.

In all the cases where it was held the action would lie, a positive right was invaded. If this was a case of ancient lights, the maxim would apply. But plaintiff having established no right, he cannot claim to be injured or damnified, as no right is infringed; legally speaking, there is no injury or damage. The defendants cannot be charged with so using their own property as to injure another. By the fence the plaintiff has been deprived of the use of that which did not belong to him, for light and air are not the subjects of property beyond the moment of actual occupancy. *Mahan v. Brown*, 13 Wend. 261; *Parker v. Foote*, 19 id. 309.

That the defendants had the right to build a fence fifty feet high, on their own land, or a high wall which should have the effect to deprive plaintiff of light and air, and obstruct his view, the plaintiff himself showing no prescriptive or other adverse right, is settled by authority.

* * *

An action on the case for a nuisance lies not, if one builds a house or other structure whereby the prospect of another is interrupted. 9 Coke, 58. It does not lie for a reasonable use of one's right, though it be to the annoyance of another. So, if, by such building, he stop

lights newly made in the house of another, though the lights have continued for thirty or forty years. Com. Dig. 429.

The doctrine of the common law, as found in Washburn on Easements and Servitudes, is, that an adjacent owner may deprive his neighbor of the light coming laterally over his land, by the erection of a wall on his own land, within the period of prescription, although he does it for the mere purpose of darkening his neighbor's windows, p. 491.

In *Chandler v. Thompson*, 3 Campbell, 82, Le Blanc, J., said: Although an action for opening windows to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action to be maintained, and he had heard it said by Eyre, Ch. J., that such an action did not lie, and that the only remedy was to build on the adjoining land opposite the offensive window.

The complaint in this declaration is, for erecting an obstruction, by which light and air were prevented from coming into plaintiff's house, rendering the rooms dark, unwholesome and uninhabitable. The point is, that defendants had a right to erect the fence, which was the obstruction alleged. The plaintiff showing no right to the free passage of light and air, must submit to this erection in the absence of any allegation that the fence was made of unfit materials, the odor from which was of a noxious nature, which, penetrating the house of plaintiff, rendered it unwholesome. To entitle him to claim damages for the erection of a fence, by which his dwelling was darkened and made unwholesome, he must show a prescriptive right to the use of the light and air, which he does not pretend. He cannot make one case in his declaration, and another and different case by his proofs. He declares against the defendants that he is possessed of a dwelling-house, with doors and windows, to and through which light and air ought to come freely, but you, the defendants, have obstructed their free passage, by which my house is darkened, rendered unwholesome and unfit for habitation. This is his whole case, as he states it in the declaration. We submit, it is not competent for him, on the trial, to prove that the materials out of which the fence was made, were filthy and unfit, or that they created an atmosphere in the house which was noxious, for that is an independent cause of action.

Now, on the question of prescription. As it is an open question in this court, we are inclined to adopt the views held and so well expressed by the Supreme Court of the State of New York in *Parker & Edgarton v. Foote*, 19 Wend., *supra*.

In commenting on the doctrine as received by the British courts, the

court say, they tell us a man may build on the extremity of his own land, and that he may lawfully have windows looking out upon the land of his neighbor. The court say, the reason why he may lawfully have such windows, should be, because he does his neighbor no wrong; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled.

And the court further says there is no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and has been sanctioned, with some qualification, by act of Parliament, but it cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law.

In *Myers v. Gemmel*, 10 Barb. 537, this case is approved.

In 3 Kent's Com. 573, it is said, the English doctrine is not much relished in this country, owing to the rapid changes and improvements in our cities and villages. A prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights and views and prospects, or, on the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with low and back buildings upon them. To the same effect is *Washburn on Easements and Servitudes*, 497.

We are disposed to concur in this view, and to hold it absurd to say that a man, by the exercise of rights over his own property for twenty years, can thereby acquire a title in the property of another. Such a doctrine is not applicable to our growing cities and villages, and was not the doctrine of the common law, as expounded in Westminster Hall, prior to the fourth year of the reign of James I.

These views render it unnecessary to consider the instructions given in this case, as it is readily seen some of them were not applicable.

As we understand the declaration, there is no cause of action stated in it to entitle the plaintiff to a recovery, and we must reverse the judgment. The judgment is therefore reversed, and the cause remanded.

NOTE: In some decisions spite fences have been held to be illegal. *Norton v. Randolph*, 176 Ala. 381; 40 L. R. A. N. S. 129, Ann. Cas. 1915A, 714; 58 So. 283.

SEC. 3. NATURAL WATERCOURSES.

McCARTER v. HUDSON CO. WATER CO.

70 N. J. Eq. 695; 118 Am. St. Rep. 754; 65 Atl. 489. (1906)

PITNEY, J. * * * In the consideration of this question, as it bears upon the case before us, it is important to keep in mind that we are dealing now only with water as it stands or flows in lakes, ponds, rivers or other streams that have a natural outlet to the sea. Such water in its natural state (so far as respects private ownership thereof) is not personal, but real property, being as much a part of the land itself as the soil and rocks. In this aspect it is viewed by the common law, which holds that he who owns the soil owns all above it and all beneath it. But in view of the transient and flowing nature of water, the land owner's property therein is not absolute, but qualified. In a sense he owns it while it is upon his land, but his ownership is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to a riparian owner, such as the supply of his domestic needs, the watering of his cattle, the irrigation of his fields, the supplying of power to his mill, and the like. This right of user is limited to so much as shall be reasonably necessary, and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality. The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others.

By the common law of England the right of diversion appears to have been confined to lands of the riparian proprietor, extending a reasonable distance from the bed of the stream. In some of the states of the Union, where large portions of territory are arid and not capable of raising crops or sustaining a population without artificial irrigation, this rule has been much relaxed, but not so as to extend irrigation beyond the limits of the watershed that is naturally drained by

the stream: *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Southern California Investment Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767; *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971.

It will thus be seen that riparian owners, as such, have not any such right in or ownership of the waters that flow upon or past their lands as will entitle them to divert a portion of the flow and convey it elsewhere for the use of others than riparian owners. It is, indeed, often said that a riparian owner may grant to others the right to a portion of the flow, provided he do not infringe upon the rights of other riparian owners thereby. But, in strictness, no more is meant by this than that if such grant be made, the grantor and his successors in title can no longer complain of such diversion: *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Ormerod v. Todmorden Mill. Co.*, L. R. 11 Q. B. Div. 155. See, also, *Doremus v. City of Paterson*, 65 N. J. Eq. 711, 55 Atl. 304. * * *

ANDERSON v. CINCINNATI SO. RY.

86 Ky. 44; 9 Am. St. Rep. 263; 5 S. W. 49. (1887)

LEWIS, J. Appellant is the owner of a water grist-mill, erected by him in 1872, on Pittman's Creek, under an order of the Pulaski County court granting the leave as provided by law in such cases. Across the same creek, about one mile below its source, and two miles above appellant's mill, appellees, the trustees of the Cincinnati Southern Railway, under charter granted by the general assembly, subsequently built their road, and at the same time erected just above the railroad crossing a wooden dam four feet high, by which a reservoir was formed from which water was taken to a supply tank, to be used in running their trains. But in 1877 or 1878, several years after the completion of their road, they erected in place of the wooden dam one built of stone, laid in cement, fourteen feet high, by which a reservoir was formed covering ten or eleven acres of land purchased by them of the riparian owner.

This action was brought by appellant against appellees for the alleged wrongful and unlawful obstruction and diversion, by reason of the stone dam, of water that hitherto flowed to and supplied the power for the operation of his mill, whereby, as he states, he has been injured.

and to a great extent deprived of the use and enjoyment of said mill.

For their defense, appellees, answer,—1. That since July, 1877, the railroad built by them, together with its franchises, appurtenances, etc., including the stone dam and reservoir, has been leased by them to the Cincinnati Railway Company and the Cincinnati, New Orleans, and Texas Pacific Railway Company, and appellees have not since that time been in the possession or had control of the dam or reservoir, and are not therefore liable for the injury complained of; 2. They deny that the flow of water to appellant's mill has, to any extent, been prevented or delayed by the erection of the stone dam; and state that there is no stream of water having channel or banks above the point where the dam is located, the reservoir being supplied with water by surface drainage at times of heavy rains and that if the water which flows above the dam was unobstructed, it would not in any way affect appellant's mill, because the quantity during a portion of each year is so small as, even when added to that below, to be insufficient to run the mill, while during the residue of the time, the quantity flowing below is sufficient to operate it as fully as if the dam had not been erected.

In our opinion, the first defense is not available.

The stone dam, which it is alleged by appellant obstructs and diverts the natural and accustomed flow of water to his mill, was erected by appellees as an appurtenance to their road, and being the primary and continuing cause of the injury complained of, there can be no question of his right to maintain this action against them for whatever damage has been unlawfully caused thereby. How far the lessees of the railroad may be liable, if at all, for taking the water already obstructed by the dam of appellees, and using it in operating their trains, is a question not now presented.

The right of every riparian owner to the enjoyment of a stream of running water in its natural state, in flow, quantity, and quality, is now well established.

"Every proprietor of lands on the banks of streams has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it is wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit, et debet currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direc-

tion, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years (fifteen under our statute), which is evidence of it. This is the clear and settled general doctrine on the subject. All the difficulty that arises consists in its application"; 2 Kent's Com., 439.

"The primary use of water is for natural and domestic purposes, and each proprietor of the land through which it flows may use as much of it as is necessary for those purposes, even if it be entirely consumed in the use; but he is limited as regards other purposes to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself;" *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106; *Arnold v. Foot*, 12 Wend. 330; *Davis v. Fuller*, 12 Vt. 178; *Mayor of Philadelphia v. Commissioners of Spring Garden*, 7 Pa. St. 348.

Water may, by a riparian owner, be withdrawn from a stream by ordinary means, or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current. But it cannot be withdrawn for the purpose of irrigation, or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420; 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. 269; 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. 175; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106. * * *

TILLOTSON v. SMITH.

32 N. H. 90; 64 Am. Dec. 355. (1855)

Action on the case for damages done plaintiff by reason of diversion of water from its natural channel by defendant, such diversion causing lands of plaintiff to become overflowed. Plea, general issue. Defendant contended that plaintiff had been rather benefited than injured by the overflow of his land, and asked that the question whether or not damage had been suffered by plaintiff be submitted to the jury,

The court were of opinion that plaintiff was entitled to nominal damages. The jury were directed by the court to return a verdict for nominal damages, the plaintiff agreeing to accept such damages. Defendant moves to set the verdict aside.

BELL, J. Every owner of land situate upon a stream has a right to the natural flow of the stream; a right to insist that the stream shall continue to run *uti curren solebat*; that it shall flow upon his land in its usual quantity; at its natural place, and at its usual height, and that it shall flow off his land upon the land of his neighbor, below in its accustomed place, and at its usual level. This right he has as an incident to the property of his land, and he cannot be deprived of it but by grant, actual or presumptive. Whenever, by reason of the interference of the owner above, the water is diverted from his land and made to run elsewhere, or the water of other streams, naturally running elsewhere, is turned upon his land, or the water of the natural stream is made to flow upon his land at a different place from its natural channel, or at a different level, or in an unnatural manner; and so whenever, by the acts of the owner of the land below, the water is obstructed, or drawn down, or made to run off in an unusual place or in an unusual manner, and actual injury ensues to any material amount, the owner of the land may maintain an action for such injury. In short, if any person, above or below, shall make any change in the natural flow of the stream, to the material injury of the owner situate upon it, or by any interference shall prevent the stream from flowing as it was wont to flow, to such injury, he is liable for the damage he may occasion. These rights are subject to the rights of the owners of the land situate above and below upon the stream to make a reasonable use of the water upon their own land while it is passing along the same. * * *

Judgment on verdict.

SEC. 4. SURFACE WATER.

GRAY v. McWILLIAMS.

98 Cal. 157; 35 Am. St. Rep. 163; 32 Pac. 976; 21 L. R. A. 593.
(1893)

SEARLES, C. Action to remove and abate as a nuisance an embankment or levee, erected by defendant upon his own land, but which held back and caused water to flow upon the land of plaintiff, and to recover damages for injury caused thereby. Plaintiff had judgment, from which and from an order denying a motion for a new trial defendant appeals.

The plaintiff, Mary Gray, has been since 1888 the owner in fee in her own right and in possession of a tract of land consisting of over forty acres situate in the county of Colusa.

The defendant, A. S. McWilliams, is and since September, 1887, has been the owner of and in possession of a tract of land of over two hundred acres, lying south of and adjoining plaintiff's land for a distance of eighty rods.

Upon the dividing line, between the land of plaintiff and defendant, is a roadway or avenue fifty feet wide, known as "Fruitvale avenue." Upon the center of this avenue is an embankment, constructed in 1884 by the grantors of plaintiff and defendant, for the double purpose of a roadway and as a check to hold water for irrigation purposes. This embankment which runs east and west, if maintained intact throughout its length prevents the water accumulating on the north side from flowing in a southerly or southwesterly direction to and upon the land of defendant, and, as a consequence, causes or tends to cause the same to accumulate upon the land of plaintiff. In the winter of 1889 and 1890 defendant closed up a waterway through this embankment, in consequence of which plaintiff's land was flooded, her orchard thereon injured, etc. The land north and east of that of plaintiff is slightly higher than plaintiff's land, there being a slight slope over the lands of plaintiff and defendant toward the southwest. These lands are all on the west side of the Sacramento river, and east of them and on the west side of said river is a large levee to protect the country from overflow in times of flood. West of this large levee, and east of the lands of the plaintiff and defendant, is a raised wagon-road leading from Colusa to Princeton, the general course of which is northwest and

southeast. Through the embankment of this road there are several openings or waterways.

The court finds that commencing at the Princeton road there is a trough, watercourse, or washout, running thence in a southwesterly direction across the lands of plaintiff and defendant, crossing "Fruitvale avenue" in its course. This "trough, watercourse, or washout" across plaintiff's land, and for one hundred feet on the land of defendant, has abrupt banks, is about three feet deep, and from twelve to fourteen feet wide. From a point on defendant's land, say one hundred feet from his north line, this trough subsides into a depression or swale, which extends for a couple of miles in a southwesterly direction to Hoppins slough, which in turn connects with a large natural water course, called the "Trough," etc.

The court finds that this trough, watercourse, or washout was formed naturally by the action of the water, has existed certainly since 1881, and serves in time of rainy weather or high water to drain and carry off the surface and surplus water from plaintiff's land and from lands of others naturally draining upon and over hers.

The court finds, as to the sources from which the waters thus accumulating upon plaintiff's land came, as follows:

"9. That the water thus thrown back upon the plaintiff's land was surface water, and was composed partly of seepage water, escaping from the Sacramento river by percolation through the river levee, and partly of rainfall; but what portion of said water was seepage or percolating water, and how much thereof was rainwater cannot be found or determined from the evidence; but there was no rush or great flow or volume of water spreading over the surface of the soil as in case of flood or overflow from the river, and at no time did it appear in such quantities but that it would have naturally passed off in the said waterway or trough on plaintiff's and defendant's lands, had there been no obstruction in said waterway or trough."

There is a branch ditch on the west side of the Princeton road, which defendant claims by his answer served to concentrate the surface waters and seepage water coming from the Sacramento river, and pour them upon plaintiff's land at a fixed point, etc., but as the finding of the court is against this view, the facts connected therewith need not be mentioned at length. Like considerations apply to matters of estoppel and prescription.

To say that the evidence is sharply contradictory scarcely conveys an adequate idea of the antagonisms it presents. There is hardly an issue made in the case but that might have been decided differently; and the

conclusion would have found support in the evidence. * * *

Among the conclusions of law deduced by the court were:

1. That plaintiff's land is the dominant tenement, and defendant's land the servient tenement; that the water which was obstructed, and caused the injury to plaintiff, was surface water and that the plaintiff had an easement, and defendant owed plaintiff a servitude for the flowage of such water from plaintiff's land onto and across defendant's land.

2. That the embankment of earth or obstruction complained of was a nuisance, and should be abated as such, etc.

Had plaintiff an easement in the land of defendant for the flow of the water in question over it?

"An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." Goddard on Easements, 2; *Stevenson v. Wallace*, 27 Gratt. 87; *Ritger v. Parker*, 8 Cush. 147; 54 Am. Dec. 744.

"A charge or burden upon one estate (the servient) for the benefit of another (the dominant)": *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444.

Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by act of man, and to the second those which are given by the law to every owner of land. This latter class is given by law, because without them there would be no security, in the enjoyment of land by its owner. Without them a neighbor might deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of all, and which the law wisely provides shall not be wrested from one by the act of another. These easements are said to be inherent in the land *ex jure naturale*, and are often termed "natural rights."

A careful review of the adjudicated cases will, it is believed, show that a good deal of obscurity has been thrown around many questions connected with the subject under consideration by a failure to observe the line of demarcation between these two classes of easements. As it is with the latter class that we have exclusively to do in the present case, we must eliminate from consideration such rules of construction as apply exclusively to easements founded upon grant or prescription.

What then is the "natural right" of the plaintiff in the premises?

It is claimed that at common law it was held that no natural easement or servitude existed in favor of the owner of the superior or higher land as to mere surface water, or such as falls or accumulates by rains or the melting of snow; and that the proprietor of the inferior or lower tenement or estate might, at his option, lawfully obstruct or hinder the flow of such water thereon, and in so doing might turn back or off of his own lands and onto and over the lands of other proprietors such water without liability by reason of such obstruction or diversion. It is also claimed that the doctrine of the civil law is almost directly the reverse of that of the common law, and that under it the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one to discharge all waters falling or accumulating on his land which is higher, upon or over the land of the servient owner as in a state of nature; and that such natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant proprietor. And as that conclusion is in unison with the doctrine on the same subject with the courts of fully one-half of the states of our union, all professing to be controlled as we are by the common law, we are justified in saying that with us the rule established has become and is a part of our common law.

In the case of *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, this court, in a well-considered opinion, held in substance that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude.

In *McDaniel v. Cummings*, 83 Cal. 515, the court was urged to overrule *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, but refused to do so, placing such refusal upon the ground of *stare decisis*. The case was, however, distinguished from *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, and passed off upon the principle laid down in *Lamb v. Reclamation District*, 73 Cal. 125; 2 Am. St. Rep. 775.

In view of the reasoning and conclusions in *McDaniel v. Cummings*, 83 Cal. 515, and *Lamb v. Reclamation District*, 73 Cal. 125, 2 Am. St. Rep. 775, it may be fairly assumed, as the consensus of opinion on the part of the court:

1. That the owner of the lower or servient tenement must permit the surface water from the higher land of his neighbor to flow unob-

structed over his lower land, as held in *Ogburn v. Connor*, 46 Cal. 347; 13 Am. Rep. 213.

2. That the rule of *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, does not apply to the overflow of water from the large rivers of the state, and that the owners of land along such streams have a right to construct levees or embankments for the protection of their lands from the ravages of flood waters, although the effect thereof may be to prevent the free discharge of such flood waters in as large and ample a manner as they would otherwise do, or may tend to increase the flow of water upon lands not similarly protected, as was held in *Lamb v. Reclamation District*, 73 Cal. 125; 2 Am. St. Rep. 775.

3. That if the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor who has not resorted to like means of protection, as was held in *McDaniel v. Cummings*, 83 Cal. 515.

If there is an essential difference in the conclusions reached in these several cases the reasons for such difference are to be found in the elementary facts forming their basis.

In the case of flood waters escaping from natural streams we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but, after all, this declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to its ultimate destination, and he who to protect himself from a flood should erect a barrier across the channel of one of our important rivers would probably be met with the declaration that it was not the proper mode of warfare, even against a "common enemy."

In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition.

Was the water held back by defendant's embankment surface water, in the sense that defendant was legally inhibited from retarding its passage over his land?

Surface water is usually defined to be such as falls from the clouds in the form of rain or snow, or rises to the surface in springs. The

reason why the owner of the higher land has an easement in the lower land for their escape is to be found, not so much in the source from which they are derived, as in the fact that nature has adopted this method of ridding the land of their presence in surplus quantity.

I can see no good reason why the water which accumulated upon the land of plaintiff should not be subject to the rules in regard to surface water, as defined in *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213.

A portion of such water (how much the court cannot determine) came from the seepage through the levee built to protect, or which at least does protect, all these lands from overflow. The evidence showed that this river levee was a large and high one; that the winter of 1889-1890 was one of heavy floods; that for some months the water was several feet above the general level of the country, and that gradually the levee became saturated until the water seeped or percolated through and under it; that it came to the surface much as springs do, and gradually sought a lower level, not in a defined channel but as surface water is wont to do, by percolation and by the force of gravity. It came without any act or agency of the plaintiff, and as she was, so far as appears, powerless to direct its course it would seem rational to say that like other surface water coming without volition, it should be permitted to pass off by the method devised by nature.

It must be within the observation of many of us that these large levees in time of protracted flood, however well constructed, are not so impervious to water under pressure but that percolation or seepage to some extent is liable to occur. Constructed as they are in this state, under the encouragement of law, for the general benefit, and effecting as they usually do great good to individuals and communities, it would seem natural that the minor inconveniences inevitable and inseparable from their existence should be borne by those upon whom they naturally fall, and that to concentrate the whole effect upon a single individual is not in consonance with our views of justice under such circumstances. Had the defendant left the waterway through Fruitvale avenue open, as he was in duty bound to do, to allow the escape of what, beyond all cavil, was the surface water upon the land of the plaintiff, this seepage water, according to the finding of the court, would have passed off without injury to plaintiff, and, so far as appears, without detriment to anyone. If the presence of this seepage water enhanced the servitude imposed upon defendant's land, it was without the action of the plaintiff, and was and is a condition not de-

pépendent upon the acts of the parties, the result of which all the landowners subject to its effect must bear in their turn.

The only theory suggesting itself under which a different conclusion could be reached is to be found in the doctrine of *McDaniel v. Cummings*, 83 Cal. 515, holding that upon the failure of the landowner next the river to construct a levee, the owner of lower land in the rear of him can do so, even though the higher land near the river is surcharged with flood water as a consequence.

If this may be done, it may be asked in case a levee is built by the landowner next the river, as in this case, which restrains the major portion of the flood water, why may not the owner of lower land in the rear, as in case of this defendant, protect himself from the minor portion or seepage water by a sublevee, even though it increases the quantity of water upon the owner of higher land, as in the case of plaintiff here? .

The answer must be that the rule enunciated in *McDaniel v. Cummings*, 83 Cal. 515, was in consonance with a sound public policy favoring a cherished object, viz., the reclamation and improvement of valuable lands subject to overflow, and was well calculated to meet and do justice in cases where the owners of higher lands along the rivers refuse or neglect to construct levees or to join with their neighbors in doing so. It does not apply here, because a main levee has been built upon the higher land contiguous to the river, which appears to effect in the main, the object of its construction.

To permit each owner of lower lands in the rear to construct sublevees to hold back the seepage water escaping from the main levee would be to permit them to flood the protected higher land in front, and thus practically to frustrate the beneficial results of the main levee. Such a rule, when thus extended, would tend to retard rather than promote improvement and consequent prosperity.

As a conclusion, after a careful examination of the case in all its different aspects, it is held that the court below was correct in its conclusions that plaintiff, as the owner of the higher land, had an easement or right to have all the water in question, including what was termed "seepage water," flow from her land to, upon, and over the land of defendant, and to that extent the land of defendant was servient and that of the plaintiff the dominant tenement.

The judgment and order appealed from should be affirmed.

GANNON v. HARGADON.

10 Allen, 106; 87 Am. Dec. 625. (1865)

Tort to recover damages for turning a stream of water so that it flowed upon the plaintiff's close. The evidence tended to show that the defendant owned a lot of land lying to the west of the plaintiff's; that along the easterly line of the defendant's lot there was a way which extended farther to the north; that on the west side of the way, and north of the defendant's lot, a ditch was dug in 1863, which extended down to within a few feet of the defendant's lot; that a few feet below the northerly line of the defendant's lot there was a low place in the way, below which deep ruts had been made; that in March, 1863, the melting of the snow and the spring rains caused a considerable flow of surface water from the land to the north of the defendant's lot, through the ditch, and over the way, and through the ruts upon the defendant's lot; and that the defendant thereupon placed turfs in the ruts just below the low place in the way, and upon his own land, for the purpose of protecting the way from injury, and thereby caused the water to flow off upon the plaintiff's land. Verdict for the plaintiff, and the defendant alleged exceptions.

BIGELOW, C. J. It seems to us that the instructions for which the defendant asked should have been given, and that those under which the case was submitted to the jury were not in accordance with the principles recognized and adopted in cases recently adjudicated by this court. The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow: *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control

the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad caelum*, is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor, where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*. On this point the instructions were clearly erroneous.

Exceptions sustained.

SEC. 5. UNDERGROUND WATER.

FORBELL v. NEW YORK.

164 N. Y. 522; 79 Am. St. Rep. 666; 58 N. E. 644; 51 L. R. A. 695.
(1900)

LONDON, J. The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from his own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the subsurface waters are unobservable from the surface they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the

defendant would have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability: *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Phelps v. Nowlen*, 72 N. Y. 40, 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179.

The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees & W. 324, and *Greenleaf v. Francis*, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil so long as it remains there is—unlike water flowing in a surface stream—a part of the soil itself; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unneces-

sary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the appellate division in *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 144. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and watercress of which the plaintiff's land was so productive before the defendant encroached upon his water supply. But the defendant can employ the

right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

SEC. 6. SUPPORT OF LAND.

TRANSPORTATION CO. v. CHICAGO.

99 U. S. 635; 25 L. Ed. 336. (1878)

This is an action of trespass on the case by the Northern Transportation Company of Ohio against Chicago, Ill., to recover damages sustained by reason of the construction by that city of a tunnel under the Chicago River along the line of La Salle Street. The company offered evidence tending to prove that it possessed a certain lot in Chicago, with dock and wharfing rights and privileges; that it owned a line of steamers running between Ogdensburgh, New York, and Chicago, and touching at intermediate points; that during 1869 and 1870 it had thirteen or fourteen of them employed, five of them arriving and departing each week from its dock on said lot, where it had, at an expense of \$17,000, constructed a warehouse and shed used in loading and unloading them, and where its office was located; that its dock extended eighty feet on the south side of the lot which abutted on the Chicago River, a navigable stream; that the city commenced, Nov. 1, 1869, building a tunnel under the river on the east line of the lot at its intersection with the river and La Salle Street, and erected a coffer-dam in front of the dock; that said dam remained until some time in August, 1870; that about Nov. 1, 1869, the city commenced excavating La Salle Street, and excavated it for some distance, blocking up the doors of the warehouse on that street, and leaving free only the entrance on Water Street; that by reason of the construction of said dam plaintiff was unable to bring its boats up to the dock or to land freight and passengers thereat, and was compelled to rent and remove to other docks and sheds; and that the negligent and improper manner in which the work, especially the excavating, was done, greatly damaged and injured the warehouse, and caused the walls to crack, settle, and in several places to fall. * * *

MR. JUSTICE STRONG delivered the opinion of the court.

We are of opinion that no error has been shown in this record,

though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passageway along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the city they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended that there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.

The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large, and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction.

Here the tunnel of which the plaintiffs complain, or rather its construction, was authorized by an act of the legislature of the State, and directed by an ordinance of the city councils. This we do not understand to be denied, and it certainly cannot be. The State, and city councils, as its agents, had full power over the highways of the city, to improve them for the uses for which they were made highways,

and the construction of the tunnel was an exercise of that power. Since La Salle Street was extended across the river, the city not only had the power, but it was its duty, to provide for convenience of passage. This it could do either by the erection of a bridge, or by the construction of a tunnel under the river and along the line of the street. And the grant of power by the legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. We do not understand this to be controverted by the plaintiffs in error. Their argument is, that though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property; yet it was liable to make compensation for the consequential damages caused to persons specially injured. To this we cannot assent.

It is immaterial whether the fee of the street was in the State or in the city or in the adjoining lot-holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the State, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *The Governor and Company of the British Cast-Plate Manufacturers v. Meredith*, 4 Durnf. & E. 794; in *Sutton v. Clarke*, 6 Taun. 28; and in *Boulton v. Crowther*, 2 Barn. & Cres. 703. It was asserted in *Green v. The Borough of Reading*, 9 Watts (Pa.) 382; *O'Connor v. Pittsburg*, 18 Pa. St. 187; in *Callendar v. Marsh*, 1 Pick. (Mass.) 418; as well as by the courts of numerous other States. It was asserted in *Smith v. The Corporation of Washington* (20 How. 135), in this court; and it has been held by the Supreme Court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents

for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta* and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Company*, 13 Wall. 166, and in *Eaton v. Boston, Concord, & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient.

The present Constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be "taken or damaged" for public use without just compensation. This is an extension of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme Court of the State in *Chicago v. Rumsey*, recently decided, and reported in *Chicago Legal News*, vol. x. p. 333. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution. There would appear, therefore, to be little left in this case for controversy.

It is insisted, however, that the plaintiffs may recover for the obstruction to the access of their lot, caused by the coffer-dam in the river. It is admitted that the dam was necessary to enable the city to construct the tunnel under the river; and it is not complained that it was unskillfully built, or that it was kept in the stream longer than the necessities of the work required, but it is contended that neither the State nor the city had any right to obstruct passage on the river at all. Yet the river is a highway, a State highway as well as a national. It has long been held that navigable rivers wholly within a State are not outside of State jurisdiction so long as Congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this court can take no cognizance. *Wilson v. The Black Bird Creek Marsh Co.*, 2 Pet. 250. In numerous instances, States have authorized obstructions in navigable streams. They have authorized the erection of bridges, the piers of which have been more or less impediments to navigation. In this case the coffer-dam was only a temporary obstruction. It was no physical encroachment upon the plaintiffs' property, and it was maintained only so long as it was needed for the public improvement. The tunnel could not have been constructed without it. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the legislature, the obstruction not having been permanent or unreasonably prolonged.

We have examined the decisions of the courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction.

Very many of the decisions relied upon were cases in which it appeared that the acts complained of as having wrought injurious consequences were done by private individuals, for their own benefit, and without sufficient legislative authority. The distinction between cases of that kind and such as the present is very obvious. It was well stated by Gibbs, C. J., in *Sutton v. Clarke* (*supra*), which, as we

have seen, was decided on the ground that the defendant was acting under the authority of an act of Parliament, deriving no advantage to himself personally, and acting to the best of his skill and within the scope of his authority, and so was not liable for consequential damages. "This case," said the Chief Justice, "is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor; he is liable. The resemblance fails in this most important point, that his act is not done for a public purpose but for private emolument. Here the defendant is not a volunteer; he executes a duty imposed upon him by the legislature, which he is bound to execute."

The observations we have made cover the whole case as made for the plaintiffs in error, except the point presented by the sixteenth assignment. That was not mentioned in the argument, but we will not overlook it.

There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiffs' buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given away. In reference to this testimony the court instructed the jury that if they were satisfied from the evidence that the sinking of the wall, or rather the cracking of the wall, was due to the weight of the wall upon the selvage or portion of the earth which was left, and not to the removal of the material which was taken out of the street, that is, from the pit, the defendants were not liable. If they were satisfied that if the wall had not stood upon the plaintiffs' lot where it did there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was due to the weight of the wall resting upon the earth after the excavation was made, then the defendant was not liable for that.

We think this instruction was entirely right. The general rule may be admitted that every land-owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the down-

ward and lateral pressure. If it did, it would put it in the power of a lot-owner, by erecting heavy buildings, on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; Washburn, Easements, c. 4, sect. 1.

WILMS v. JESS.

94 Ill. 464; 34 Am. Rep. 242. (1880)

SCHOLFIELD, J. Appellee brought an action on the case against appellant and another, in the Circuit Court of Sangamon county for injuries, to appellee's premises, caused by the removal by the appellant and his co-defendant of the underlying strata of coal, without leaving sufficient support for the surface.

The entire title to the lot of ground involved in the litigation was originally in Jacob Bunn; but on the 29th day of March, 1870, he leased to the assignor of appellant and his co-defendant "the sole and exclusive right of boring, digging and otherwise prospecting for coal," in a large body of land, including this lot, and of "taking out and working the said coal, together with the right of way and surface of so much of the tract as may be necessary for the economical use of the same." The lease contained, among others, this clause: "It is further understood and agreed, that the said party of the second part shall mine the coal in a workmanlike manner, no pillars to be withdrawn within six hundred (600) feet of the shaft, and that the entries giving access to the coal not mined at the termination of this lease shall be turned over to the party of the first part in as good condition as the nature of the mine will admit."

On the 5th day of October, 1877, Bunn, having previously sold, conveyed this lot to appellee, making this exception in the deed: "Except all coals and minerals of every description under the surface of said premises (which is hereby expressly reserved), and the right to take therefrom all coals and minerals with the privilege of extending entries thereunder."

Appellee at once took possession of the lot and soon thereafter commenced making improvements thereon, and had dug a well, constructed a cistern, began the erection of a house which was estimated

to cost some \$5,500 and progressed therewith until the brick-work was completed, the frame-work raised and sheeted ready for weatherboarding, and the roof and cupola completed, when the surface of the underlying soil suddenly subsided for the distance of some three feet, and thereby seriously damaged the house and destroyed the well and cistern.

This was caused by appellant and his co-defendant mining and removing the strata of coal underlying the lot.

The gist of the action as averred in the several counts of the declaration is, the mining and removal of the coal without leaving sufficient support for the surface.

Appellant and his co-defendant pleaded not guilty. The cause was submitted to a jury who returned a verdict finding the defendants guilty, and assessing the plaintiff's damages at \$1,000. The Circuit Court, after overruling motions for new trial and in arrest of judgment, rendered judgment upon this verdict, and appellant took the case, by appeal, to the Appellate Court for the third district, where the judgment of the Circuit Court was affirmed.

The present appeal is from that judgment of affirmance.

The lease under which appellant claims confers the right to work the mine and take out the coal, and as incident thereto, the use of usual and appropriate means therefor; and it also gives a right of way and surface use of so much of the superincumbent soil as is necessary for the economical and efficient working of the mine. It does not, however, assume to confer any right to destroy or injure or further burden the superincumbent soil.

Where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. *Humphreys v. Brogden*, 12 Q. B. 743 (1 Eng. Law & Eq. 241); *Harris v. Ryding*, 5 M. & W. 59; *Smart v. Morton*, 5 Ell. & Bl. 30.

But it is contended, appellant and his co-defendant were exonerated from protecting the surface, because the lease here stipulates that "no pillars shall be withdrawn within six hundred feet of the shaft," upon the principle that "having expressed some, the parties have expressed all the conditions by which they intend to be bound under that instrument."

By looking to the lease we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the

mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of the lease, shall be turned over, etc., in good condition, etc., etc.—all for the obvious purpose of preserving the shaft and access to coal not mined.

No attempt is made to regulate the rights and obligations of the parties in respect of the superincumbent soil, further than to confer the right of way thereover, and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law.

The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil. *Coleman v. Chadwick*, 8 Penn. St. 81; *Horner v. Watson*, 29 P. F. Smith, 251; s. c., 21 Am. Rep. 55; *Jones v. Wagner*, 10 P. F. Smith 429, s. c., 5 Am. Rep. 385; *Harris v. Ryding*, *supra*; *Zinc Co. v. Franklinite Co.*, 13 N. J. Eq. 342; *Smart v. Morton*, *supra*.

And it is held, where a land-owner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. *Hext v. Gill*, L. R., 7 Ch. App. 699.

But it is contended, this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata to support additional buildings, in the absence of express stipulation to that effect. This is doubtless true, but "the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself." *Wood on Nuisance*, 201; *Brown v. Robins*, 4 Hurl. & Nor. 185; *Hamer v. Knowles*, 6 id. 459.

The act of removing all support from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding, but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributive negligence, and may be proved in defense. The authorities do

not require that plaintiff's proof shall exclude that hypothesis in the first instance.

The finding of the appellate court that the judgment of the Circuit Court is sustained by the evidence, there being evidence tending to that end, relieves us from a discussion of the evidence.

We think the instructions given by the Circuit Court are substantially in harmony with the views herein expressed, and there is no error of law complained of in any other respect.

The judgment of the appellate court is affirmed.

CHAPTER XVIII.

EASEMENTS.

- Section 1. Nature of an Easement.
- Section 2. Licenses.
- Section 3. Easements in Gross.
- Section 4. Watercourses.
- Section 5. Creation of Easements.
- Section 6. Interference with Easement.

SEC. 1. NATURE OF AN EASEMENT.

SCRIVER v. SMITH, *Supra*, p. 588.

GRAY v. McWILLIAMS, *Supra*, p. 601.

SEC. 2. LICENSES.

EWING v. RHEA, *Supra*, p. 15.

VILLAGE OF DWIGHT v. HAYES, *Infra*, p. 633.

HILL v. HILL.

113 Mass. 103; 18 Am. Rep. 455. (1873)

Contract. The declaration contained two counts. The first alleged in substance that the plaintiff conveyed by deed certain real estate to

the defendant, for the sum of \$1,000, and that the defendant owed the plaintiff \$600, the balance due of that sum. The second in substance alleged that the plaintiff and defendant owned a farm in common, which they agreed to divide; that the plaintiff was to have all the wood, timber and trees on a portion of it, with a right to cut and take them away; that the parties mutually made conveyances, the plaintiff attempting to reserve in the conveyance made by him the wood and timber as agreed upon; that the attempted reservation was invalid, and that the defendant, in violation of his agreement, prevented him from taking the wood, timber and trees.

In the Superior Court the case was submitted upon an agreed statement of facts, from which it appeared, that April 22, 1865, John Hill, Sr., who then owned a farm in Charlton, conveyed it to his two sons, the plaintiff and the defendant in this suit; that they entered into possession and occupied it in common till May 5, 1865, when they made partition between them by quitclaim deeds; that the defendant released his right in a part of the farm to the plaintiff, and the plaintiff released his right in the remainder to the defendant, making the following reservation: "Said grantor, John Hill, Jr., reserves for his own use all the wood, timber and trees now standing and being on" a certain part of the land conveyed, described by metes and bounds, "containing eight acres, more or less, with the right and privilege for the grantor, his heirs and assigns, to enter on said premises at any and all times, to cut and take away said wood and timber, with the privilege of crossing over the land of the grantee for that purpose;" that this reservation was made as a part of the consideration of the release from the plaintiff to the defendant and in order to make the division equal; that each entered into and continued in the possession of the premises released to him; that soon after May 5, the defendant asked the plaintiff when he was going to cut and remove the wood, timber and trees; that the plaintiff replied that he should do it when he got ready, and that he had a right to have it stand and remain there as long as he pleased.

It further appeared that the plaintiff never did cut any of the wood, timber or trees, but suffered them to remain till about June 22, 1868, when the defendant gave him a notice in writing, forbidding him from entering for the purpose of cutting or removing them; that February 5, 1870, the plaintiff sold the wood, timber and trees to Horace Cutting, Jr., for \$600 and gave him a written bill of sale; that Cutting paid \$300 in money and gave his note, which has not been paid, for the balance; that Cutting entered and cut more than one-half of the wood, timber and trees, and removed and sold them; that for this the de-

fendant brought an action of tort in the nature of trover against Cutting, which is reported 107 Mass. 596; and that the defendant refused to permit the plaintiff or Cutting to cut and remove the balance of the wood, timber and trees.

If the plaintiff was entitled to recover in this action, the case was to be sent to an assessor to assess the damages; otherwise judgment was to be entered for the defendant.

The court ordered judgment for the plaintiff, and the defendant appealed.

MORTON, J. In *Hill v. Cutting*, 107 Mass. 596, the mutual deeds of partition between the parties to this suit were before the court for construction, and it was held that the clause in the deed of John Hill, reserving the wood, timber and trees, on the lot of eight acres, could not operate by way of exception or reservation, as to the undivided half which belonged to Philemon; but that it might have the effect of a parol transfer of the wood then standing on the premises, as personal property, and a license to enter and cut the same, which was good until revoked. It did not appear, by the statement of facts in that case, that Philemon had notified John to cut the wood within a reasonable time, or had done anything to revoke the license.

In the case at bar, the plaintiff claims upon the ground that, as a part of the consideration of his deed of release, the defendant entered into an oral agreement, the terms of which are embodied in the attempted reservation, and that the defendant refuses to permit the plaintiff to enter and cut and remove the balance of the wood and timber not removed by Cutting. By such an oral agreement, no title to the land passes, and no property in the trees is acquired until they are severed from the realty. The refusal of the vendor to permit the vendee to enter upon the land for the purpose of cutting the trees is merely a breach of an executory contract, the remedy for which is an action for damages. *Drake v. Wells*, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 441; *White v. Foster*, 102 Mass. 375.

If the plaintiff, therefore, can maintain this action, it must be upon proof that the defendant has made an executory contract to transfer the wood and timber, and that he has broken such contract. The attempted reservation, which it is agreed expresses the contract of the parties, is as follows: "Said grantor, John Hill, Jr., reserves for his own use all the wood, timber and trees now standing and being on" a certain part of the land herein conveyed, described by metes and bounds, "containing eight acres more or less, with the right and privilege for the grantor, his heirs and assigns, to enter on said premises

at any and all times, to cut and take away said wood and timber, with the privilege of crossing over the land of the grantee for that purpose."

The plaintiff contends that, by the true construction of the contract, he had a right at any time in the future, without any limitation, to enter and cut the trees; the defendant contends that, as no limitation of time is fixed in the contract, the law implies that the contract is to be executed on the part of the plaintiff within a reasonable time. We are of the opinion that the view taken by the defendant is right. It is not reasonable to presume that it was the intention of the parties to subject the land to a permanent easement. The right claimed by the plaintiff would deprive the defendant of the full use and enjoyment of his land for an indefinite time, which might extend through his life, and would give the plaintiff for that time the principal, if not the sole, beneficial use of it.

A similar question arose in *Gilmore v. Wilbur*, 12 Pick. 120, and it was there held, that a parol license to cut and carry away wood, when no time is limited, must be acted upon within a reasonable time, and must be considered as applying to the wood, as substantially in the state of growth in which it then was.

The claim of the plaintiff that he had the right to have the trees remain, drawing nourishment from the soil, as long as he chose, is, we think, contrary to the intentions of the parties; and the case falls within the general rule, that when by an executory contract a party is to do some act, and no time is limited, it is to be done within a reasonable time. *Atwood v. Cobb*, 16 Pick. 227.

Such being the contract of the parties, the remaining question is, whether the defendant allowed the plaintiff a reasonable time to enter and cut the wood. As all the facts are agreed, this is a question for the court. It appears that soon after the contract was made, the defendant asked the plaintiff when he was going to cut and remove the wood; and the plaintiff replied, "that he should do it when he got ready, and that he had a right to have it stand and remain there as long as he pleased." The plaintiff did not cut any, but suffered it to remain growing until June, 1868, more than three years after the contract, when the defendant gave him a notice in writing forbidding him from entering for the purpose of cutting and removing the trees. In our judgment, this was all the time the plaintiff could require to cut under his license, and the defendant was justified in forbidding him to enter after that time had elapsed. If, instead of claiming a right, adverse to the defendant, to use the land for the growth of the trees, the plaintiff had used due diligence, he could have removed the wood

and timber in much less time. By neglecting to act under the license within a reasonable time, he lost the benefit of his contract, and by his own laches has failed to realize a part of the consideration of his deed to the defendant.

The defendant has not broken his contract. He allowed the plaintiff a reasonable time to remove the trees. As the plaintiff failed to do so within the time limited by the contract, his right ceased, and the trees became the property of the owner of the soil. *Reed v. Merrifield*, 10 Metc. 155. It follows that the plaintiff, upon the facts agreed, cannot maintain his action.

LONG v. BUCHANAN.

27 Md. 502; 92 Am. Dec. 653. (1867)

Trespass *quare clausum fregit* for entering plaintiff's close. Defendants pleaded a sale of corn by plaintiff to them, and a license to enter plaintiff's premises to remove it. The substance of the contract is stated in the opinion. Plaintiff, upon the trial, asked the following instructions: 1. If the jury shall find from the evidence in the cause that the corn mentioned in the declaration was sold by the plaintiff to Simon Long, one of the defendants, and that it was to be measured on the land and premises of the plaintiff, and that after the making of said contract for the corn the plaintiff notified Simon Long that he would not remove or take it away, and that after such notice, Simon Long sold the corn to Benjamin Long and the other defendant, and at the time of the sale Simon Long informed Benjamin Long of the fact that such notice had been given him by the plaintiff not to take away or remove the corn, and that afterwards Benjamin Long entered upon the farm of the plaintiff, and without his consent and forcibly took the corn without measuring it, as agreed upon, and carried the same away, then the defendant's plea of leave and license pleaded in this case is not sustained, and Benjamin Long is liable for trespass for entering the land of the plaintiff, breaking open the crib, and carrying away the corn; 2. That if the jury find that Simon Long, after taking away the corn, received an account of its quantity from Benjamin Long, and settled with Benjamin for it, then Simon Long is liable as a trespasser for the entry upon the land and premises, and the taking away of the corn; 3. That if the jury find the facts stated in the first of the fore-

going prayers, then the written agreement given in evidence by the defendants allowing them to enter upon the land, and take away the corn, is not sufficient evidence of an accord and satisfaction as to the entry upon the land and premises of the plaintiff, and the breaking and forcible entry into the crib. The defendant then prayed the court for the following, among other instructions, and which are referred to by number in the opinion; 2. If the jury find from the evidence that plaintiff in October, 1863, owned the corn and close mentioned in the declaration, and was then indebted to Simon Long and Shafer, to secure which indebtedness plaintiff executed a mortgage upon said corn, and that before the trespass complained of the plaintiff sold the corn to Simon Long, under an agreement that the crop should be delivered by plaintiff's placing it in a crib for Simon Long upon said close, and that the price of the corn should be allowed as a credit upon the mortgage debt, then the defendant, Benjamin Long, as Simon Long's successor, was entitled to enter the close for the purpose of taking and carrying away the corn, and that if the entry and breaking were made for such purpose, the plaintiff cannot recover; 3. If the jury find the indebtedness and execution of the mortgage as aforesaid, and that at the same time plaintiff was the owner of the crop of corn, and shall further find the sale and agreement as aforesaid, and that plaintiff agreed that Simon Long might enter to take away the corn from the crib at his pleasure, and that defendant Long, or his successors, did so enter with that intention, then the plaintiff cannot recover; 4. This instruction requested and refused was the same as the last, except in being based upon an agreement that defendant Long, or his successor, might enter at any time for the purpose of taking away the corn. The remaining facts appear in the opinion.

WEISEL, J. The appeal in this case is by one of three co-defendants in an action of trespass *quare clausum fregit*, the verdict and judgment being against him alone. The only exception in the case is to the granting by the court below of the plaintiff's prayers, and the refusal to grant the second, third, and fourth prayers of the defendants. The first and third prayers of the plaintiff, in our judgment, were correctly granted. The second need not be passed upon, as Simon Long was not affected by the verdict and judgment. The principal defense was the leave and license pleaded in the second plea. The three prayers of the defendants, refused by the court below, present this to our consideration; and it is contended that the evidence adduced by the defendants, and relied upon to support them, not only proved the license, but disclosed the fact that it was coupled with an interest

that rendered it irrevocable; and if so, the prayers contained correct propositions of law, and should have been granted by the court. It appears by the defendants' proof that the plaintiff had agreed with the defendant Simon Long, not simply to sell him the corn, but to put it in her crib for him, for measurement, from which he was privileged to take it; that the corn was to be settled for by a credit upon a mortgage he held against her, and a receipt so given, and that a larger price was paid for it than the then current prices in the market; that the corn was placed in the crib, and the said Simon invited to go for it, or had notice to take it away at his pleasure. This state of facts, if proved to the satisfaction of the jury, would constitute a license coupled with an interest or grant which rendered it irrevocable.

Care must be taken not to confound this case with those of a class in which the license, though coupled with an interest, is nevertheless of a revocable nature, and would furnish no justification to the licensee for acts done after revocation. These are cases where the interest partakes of the realty, or is of such a nature as to require for its validity a deed, or a compliance with the statute of frauds, as an easement, right of way, or other interest in, upon, or out of the land itself. Of this class is the case of *Wood v. Leadbitter*, 13 Mees. & W. 838, cited by the counsel on both sides in the argument. It was very fully considered by the court of exchequer, and all the English cases ably reviewed by Baron Alderson in the opinion delivered in it. The note to the case in Hare and Wallace's edition points to the leading American decisions, to which we may add the cases of *Hays v. Richardson*, 1 Gill & J. 366, and *Addison v. Hack*, 2 Gill, 221 (41 Am. Dec. 421), as bearing upon the question. From these we deduce these principles, that a license, according to Vaughan, C. J., "properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful;" as a license to hunt in a man's park or to come into his house. But a license to hunt in a man's park and carry away the deer killed to his own use, or to cut down a tree and carry it away the next day, is something more than a mere license; so far as the taking away of the deer killed or the tree cut down, it is a grant. A mere license is revocable. But where it is connected with a grant, the party who has given it cannot in general revoke it, so as to defeat the grant to which it was an incident.

In all cases of a license by parol, where the grant is of a nature capable of being made by parol, the license is irrevocable. But where the license by parol is coupled with a parol grant of something which is incapable of being granted otherwise than by deed or by compliance

with a statutory requirement, there the license is a mere license, because the grant annexed to it wants legal validity; and like all mere licenses, it is revocable. These distinctions are clearly illustrated in the following extract from the opinion referred to: "Thus a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which without the license would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be, on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable": *Wood v. Leadbitter*, 13 Mees. & W. 845.

The case of *Wood v. Manley*, 11 Ad. & E. 34, cited and relied on by the appellant, is one coupled with an interest, grantable by parol, and irrevocable. The hay in question had been sold by the plaintiff's landlord under a distress for rent, and the conditions of the sale were, that the purchaser might leave it on the close until Lady Day, and come in the meantime onto the close, and from time to time as often as he should see fit, and remove it. To these conditions the plaintiff assented, but before the day locked up the close to prevent the ingress of the purchaser and the removal of the hay. The defendant, the purchaser, broke open the gate, and carried away the hay. He obtained the verdict, under the instructions of Erskine, J., on the ground that the license was irrevocable. On a motion to set aside the verdict, on the ground that the license was revocable and revoked, the court of queen's bench refused to grant a rule; and, Baron Alderson adds (p. 853), "we think quite rightly. This was a case not of a mere license, but of a license coupled with an interest. The hay by the sale became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by Chief Justice Vaughan, irrevocable by the plaintiff, and the rule was properly refused. The case was analogous to that of a man taking my goods, and

putting them on his land, in which case I am justified in going on the land and removing them: Vin. Abr., tit. Trespass, H, a, 2, pl. 12; and Patrick v. Colerick, 3 Mees. & W. 483." See also *Ex parte* Coburn, 1 Cow. 568; and Barnes v. Barnes, 6 Vt. 388.

We think the case under consideration cannot be distinguished from that of Wood v. Manley, 11 Ad. & E. 34, followed in its principles by the other cases referred to, if the facts relied upon by the defendants as to the character of the license were found by the jury, and that the same law is applicable to it. The prayers of the defendants that were refused by the court below presented this hypothesis of the case, and it was not necessary that they should refer to the facts relied upon by the plaintiff to prove a revocation of the license; for notwithstanding them (the license upon the defendant's hypothesis being irrevocable), the plaintiff would not be entitled to recover if the others stated were found to exist. Nor is there anything in them to conflict with the first prayer of the plaintiff. These prayers ought therefore to have been granted and we must reverse the judgment.

SEC. 3. EASEMENTS IN GROSS.

LINTHICUM v. RAY.

9 Wall. (U. S.) 241; 19 L. Ed. 657. (1869)

This was an action on the case for obstructing the plaintiff in the use of a wharf in the city of Georgetown, in the District of Columbia. The wharf was situated on the south side of Water Street, between Market and Frederick Streets, in that city, and extended one hundred and one feet on the Potomac River. The plaintiff asserted a right to its use under various *mesne* conveyances from Francis and Charles Lowndes. It appeared from the evidence, that in the year 1800, these parties were the joint owners of a wharf occupying the site of the present wharf, and of similar dimensions. At the same time, Francis Lowndes owned in his own right two lots on the north side of Water Street, opposite the wharf, which he had improved by the erection thereon of two warehouses. These buildings were separated from each other by about twenty feet. In 1804 the two Lowndes united in a deed conveying to Richard and Leonard H. Johns the intervening lot between the two buildings, with its appurtenances, and also to them,

"their heirs and assigns, the privileges, and rights of using the wharf built" by the Lowndes, "free of all expense, for the purpose, from time to time, of mooring their ships or vessels, and for loading and unloading the same," and for all goods imported or exported by them. The several *mesne* conveyances which bring the property to the plaintiff cover the same lot and the same "privileges and rights of using the wharf," describing both in similar language.

On the other hand, the defendant asserted a right to the wharf itself, as it now existed, and not merely a right to its use, and traced his title to the same original source,—Francis and Charles Lowndes.

It appeared from the deeds produced, that in April, 1800, these parties conveyed to one Templeman, in trust to indemnify him for his past indorsements, and any future indorsements he might make for them, and one John Suter, of notes in the Bank of Columbia, the two improved lots on the north side of Water Street, and the wharf mentioned. The trust-deed was accompanied with a power to the grantee to sell this property, and apply the proceeds to the payment of the notes indorsed by him, which were not taken up at maturity by their makers. In 1807, Templeman conveyed the property to Walter Smith upon trust to sell the same, whenever requested by the Bank of Columbia, to pay certain notes. In this conveyance Francis Lowndes joined. By sundry *mesne* conveyances from Walter Smith, the property, as contended by the defendant, became vested in him in 1858. At this time the wharf, which existed in 1804, had perished, and a new wharf, the one now in existence, was constructed in its place by the defendant, and has ever since remained in his exclusive possession.

The court below instructed the jury, that upon the evidence produced in the case the plaintiff was not entitled to recover, and the jury accordingly found for the defendant. The plaintiff excepted to the instruction, and brought the case here.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

We do not deem it important to consider whether the conveyance to Smith from Templeman, the trustee, was authorized by the power contained in the deed to the latter, or whether the subsequent conveyances under Smith operated to vest a good title to the land upon which the present wharf is situated, or such a right of wharfage as to authorize the construction and exclusive use of the present wharf. The possession of the defendant under color and with claim of title is sufficient to put the plaintiff upon proof of a better title to the wharf, or, at least, of an equal right with the defendant to its use. And such proof

he has not produced. The deed of the two Lowndes to the Johns in 1804, under which he derives all the claim he possesses, only conferred a right to the use of the wharf then in existence, and not any general right of wharfage, or any right to the land covered by the wharf. Its language is that it grants the right "of using the wharf built" by the Lowndes, referring clearly to the structure then erected. And the right to use the wharf is limited to that of mooring to it the ships and vessels of the grantees, for loading and unloading and of passing over it goods imported or exported by them. The deed contains no provision for keeping the wharf in repair, or for building a new one in case of its destruction, or any clause indicating an intention to confer any right or privilege of greater duration than that of the structure then existing.

Nor was the right to use the wharf made appurtenant to the twenty feet lot, situated on the north side of Water Street, by being conveyed to the Johns in the same instrument. It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land so as to become appurtenant to it.

The right was not attached as an incident to any estate; it passed by a grant in gross, and was necessarily limited in its duration by the existence of the structure with which it was connected.

Judgment affirmed.

SEC. 4. WATERCOURSES.

VILLAGE OF DWIGHT v. HAYES.

150 Ill. 273; 41 Am. St. Rep. 367; 37 N. E. 218. (1894)

BAILEY, J. This was a bill in chancery, brought by John A. Hayes against the village of Dwight, to restrain the village from constructing a system of sewers, so that the same will discharge the sewage of the village into Gooseberry creek, a stream of water running through the complainant's land. The complainant owns and resides on a farm, containing about two hundred and twelve acres, situate in Grundy county, and adjoining the south line of the county. The village of Dwight is an incorporated village, having a population of about sixteen hundred, and situated in Livingston county, and about a mile or a mile and a half south of the south line of Grundy county. Gooseberry

creek has its headwaters several miles south of Dwight in two separate branches, one of which runs through the village, the two forming a junction about a half mile below on the land of David McWilliams, and running thence in a northerly direction across the complainant's land which adjoins that of McWilliams on the north, and emptying into Mazon creek.

Gooseberry creek, as the evidence shows, is a stream in which water constantly flows, except during certain portions of the dry weather in summer, and during that time it contains pools of water at different places along its channel, sufficient in quantity and of sufficient purity to furnish drink for cattle and other domestic animals kept by the owners of the lands through which it flows. The complainant, as it appears, occupies and uses his land as a stock farm, and has been accustomed for many years to use the creek for watering his stock, and he has also been accustomed, during the winter season, to take from it his supply of ice for use during the summer.

In the summer of 1892 the village of Dwight commenced the construction of a system of sewers which were to be so constructed as to discharge the sewage of the village into Gooseberry creek, at a point on the land of McWilliams a short distance below the confluence of the two branches of the creek. The complainant thereupon filed his bill to restrain the village from discharging the sewage from its proposed system of sewers into the creek, alleging that there was a constant supply of living water in the creek, sufficiently pure and good for stock; that the complainant was using his farm as a stock farm, and relied upon the waters of the creek for the purposes of watering his stock, and that he cut ice therefrom and stored the same at his residence for the use of his family, and that the discharge of the sewage into the creek would render the water thereof unfit for the domestic uses above referred to, and would also cause noxious odors to spread over the complainant's farm and about his place of residence, thereby rendering the same unhealthful and uncomfortable as a place in which to live, and so would cause irreparable damage to the complainant's premises and place of residence, and would create a nuisance.

On the filing of the bill an injunction *pendente lite* was awarded as prayed for, and an answer and replication having been afterwards filed, the cause was heard on pleadings and proofs, and at such hearing a decree was entered by the circuit court, dismissing the bill at the complainant's costs for want of equity, but without prejudice to the complainant's right to prosecute an action at law. On appeal by the complainant to the appellate court the decree was reversed and the

cause remanded, with directions to the circuit court to enter a decree in favor of the complainant making the injunction perpetual. From the judgment of reversal the village of Dwight now appeals to this court.

A large number of witnesses were examined, and the testimony in the record is very voluminous and to a very considerable degree conflicting. Among other things the opinions of many witnesses were taken as to what would be the probable effects upon the waters of the creek, as they flow across the complainant's land, and upon the surrounding atmosphere, of discharging the sewage of the village into the creek a short distance above his premises. While some of these witnesses seem to be of the opinion that no serious pollution of the water would result, and no nuisance be created, we concur in the opinion of the appellate court that the decided preponderance of the evidence sustains the conclusion that the water would thereby become so polluted as to render it unfit for domestic use, or for the drink of domestic animals. And this view is strongly reinforced by the inherent probabilities of the case.

Such being the case there can be no doubt, as it seems to us, as to the right of the complainant to relief in equity. As said by Mr. High, in his *Treatise on Injunctions*, section 810: "Frequent ground of application for the preventive aid of equity is found in cases of the pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured and rendered unfit for use. In cases of this nature the preventive jurisdiction of equity is well established, the general doctrine being that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction. In conformity with this doctrine the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage."

In *Gould on Waters*, section 546, the rule is laid down as follows: "An authority over sewage is not an authority to commit a nuisance. An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage. So an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use, and it is not a defense that the city can lawfully enter upon the premises of those who use the sewer for the purpose of abating the nuisance. And if a few householders upon the stream have used it as a drain, a modern board cannot found a prescriptive right to corrupt the stream upon such usage. If any nuisance of this kind be shown, though causing incon-

siderable damage, equity will enjoin its continuance. In deciding upon the right of a proprietor to an injunction against such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of the system of sewers is immaterial where the rights of an individual are invaded." See, also, Wood on Nuisances, sec. 683, *et seq.* See, also, Dierks v. Commissioners of Highways, 142 Ill. 197.

It is true the creek in question is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper places along its channel. But this fact manifestly would only tend to aggravate the nuisance, especially in those places situated, as is the complainant's land, but a little distance from the proposed point for the discharge of the sewage. The necessary result would be that in the hot and dry weather of summer the offensive substances discharged from the sewer would accumulate and remain at or near the point of discharge, not only defiling and polluting the pools of water standing in that portion of the channel, but emitting noxious vapors, corrupting and poisoning the atmosphere in that vicinity.

The decree of the circuit court dismissing the bill is sought to be sustained on the ground that before the complainant is entitled to an injunction he must bring his suit at law and have his right determined by a jury. While it is a general rule, and one which was formerly enforced with very considerable strictness, that before a court equity will interfere by injunction to restrain a private nuisance, the complainant must establish his right in a court of law, that rule has in modern times been somewhat relaxed. In Oswald v. Wolf, 129 Ill. 200, in discussing this branch of equity jurisdiction, we said: "Even this power was formerly exercised very sparingly and only in extreme cases, at least until after the right and question of nuisance had been settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that, to entitle a party to equitable relief before resorting to a court of law, his case must be clear, so as to be free from all substantial doubt as to his right to relief."

We are disposed to think that the complainant's case is one which, within the rule as thus laid down, entitles him to an injunction, without having first established his right at law. None of the substantial facts upon which his right rests are controverted. His title to and possession of the land across which the creek in question runs, and the intention of the village to construct its system of sewers and discharge

its sewage into the creek a few rods above his land, are admitted. It is true some witnesses are produced who express the opinion that the proposed discharge of the sewage of the village into this stream will not have the effect of materially polluting the water in the creek, but, in our judgment, little weight is to be given to the testimony of witnesses who attempt to swear contrary to known and established natural laws. That the sewage of a village of sixteen hundred inhabitants discharged into a small stream will materially pollute the water of the stream, and render it unfit for domestic use for at least a few rods below the point of discharge, is a proposition too plain and too thoroughly verified by ordinary experience and observation to admit of reasonable doubt. That such disposition by the village of its sewage will create and constitute a nuisance *per se* is a proposition too plain for serious question.

The case of *Wahle v. Reinbach*, 76 Ill. 322, was a bill in equity for an injunction to restrain a threatened nuisance, the nuisance consisting of constructing a privy on a lot adjoining that of the complainant, within eight feet of the complainant's dwelling-house and cellar, and within twenty-feet of the well from which the complainant and his family were supplied with water for drinking, cooking, and other domestic purposes. It was urged by the defendant that, before an injunction could issue in a case of that character, it was necessary that it should be previously determined by a jury in a trial at law that a nuisance in fact existed: This contention was overruled, the court citing in support of its judgment, among various other authorities, the following passage from *Kerr on Injunctions*: "The court will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." It was accordingly held that a privy so constructed and located as to corrupt the water of a well used for domestic purposes, or so near the complainant's dwelling-house as to annoy him in the proper enjoyment of his property, constituted a nuisance *per se*, and that no preliminary declaration of that fact by a jury was necessary to give a court of equity jurisdiction.

We are satisfied that the same rule should be applied here. The discharge of the sewage of the village into the creek, thereby corrupting the waters of the stream as it flows across the complainant's land, would create a nuisance *per se*, and the complainant was therefore

clearly entitled to an injunction restraining the creation of such threatened nuisance.

But it is contended that the complainant gave his consent to the construction of the proposed system of sewers, and to the discharge of the sewage of the village into the creek, and that he thereby estopped himself from any right to the relief now prayed for. The evidence shows that when the construction of the proposed system of sewers was in contemplation, a public meeting of the citizens of the village of Dwight, was called by the municipal authorities, to consider the advisability of constructing the proposed sewers, and that the complainant was one of those who attended the meeting. It also appears that during the meeting his views were called for, and that he thereupon made a few remarks, in which, as is claimed, he expressed his approbation of the enterprise, and his willingness that the sewers should be so constructed as to discharge the sewage into the creek. He testifies, on the other hand, that he at the time supposed that the sewer under consideration was merely a sewer to convey off the sewage from the buildings of the Keeley Institute, and not a general system of sewers for the entire village, and that whatever he may have said had reference solely to that one sewer, and that he did not intend to be understood as consenting to a discharge into the creek of all the sewage of the village, and there are some circumstances corroborative of the complainant's account of the matter.

How far, if at all, the subsequent action of the village authorities was taken in reliance upon what was said by the complainant at this meeting does not appear, but the evidence shows that they subsequently caused plans and specifications of the proposed system of sewers to be prepared at considerable expense, adopted the necessary ordinance providing for its construction, and entered into a contract with certain parties to construct the sewers at a stipulated price. It also appears that the contractors, after the execution of the contract, commenced its performance by placing on the ground considerable quantities of brick and tile for the sewers. After this was done the authorities of the village applied to the complainant for a deed granting to them the right to discharge the sewage into the creek, but that the complainant refused to give, and it is conceded that he then or thereafter revoked any oral license which he may have given to the village to discharge its sewage in that manner.

The most that can be said of the complainant's consent to the proposed system of sewers, if he in fact gave such consent, is that it was a mere oral license which was revocable at any time by the licensor.

The right to pollute the waters of the creek by discharging the sewage into it was in the nature of an easement, which could be created only by grant or prescription, and a mere oral consent to such pollution of the stream vested in the village no right which it was not in the power of the complainant at any time to recall. Nor did the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers present any obstacle to such revocation: *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243; *Woodward v. Seely*, 11 Ill. 157; 50 Am. Dec. 445; *Tiedeman on Real Property*, sec. 653, and cases cited in note.

So far as the village expended money or incurred liabilities in the matter of constructing the proposed sewers it must be held to have done so with full knowledge of the fact that the complainant had in no way obligated himself to allow the sewage to be discharged into the creek, by any binding act or instrument, and that he was at liberty at any time to recall the consent which he had orally given. And if, under these circumstances, and without seeking to obtain from him any grant of the right of way over his land, or the execution by him of any other binding obligation in the premises, the village authorities saw fit to take steps towards the construction of the sewers, they are hardly in a position to invoke the doctrine of estoppel for the purpose of precluding the complainant from the assertion of his legal or equitable rights in the premises. * * *

Judgment affirmed.

SEC. 5. CREATION OF EASEMENTS.

WATKINS v. PECK.

13 N. H. 360; 40 Am. Dec. 156. (1843)

PARKER, C. J. The plaintiffs set up a right to have the water run from a spring on land formerly owned by Benjamin Bellows, through the land of the defendant, to the several houses occupied by them, and to keep in repair an aqueduct for that purpose. They produce no title deeds granting to them the waters of the spring, or the right of conveying it through the land of others; but they rely upon an uninterrupted usage, of themselves and those whose estates they have, to take it in a certain manner, for the term of more than twenty years, as evidence of

a grant, or title; and they claim the right to continue to use the water. in the manner they have been accustomed to do for that period. The adverse, or exclusive use of water in a particular manner, for the term of twenty years, furnishes presumptive evidence of a grant: *Bullen v. Runnels*, 2 N. H. 257 (9 Am. Dec. 55). And this is as true in relation to water flowing through an aqueduct, for use at a house, by the occupants, as it is in relation to the water of a river, used for propelling machinery. The main question presented by the case is, therefore, whether the plaintiffs have shown such an adverse use, as entitles them to the benefit of the principle.

The evidence is clear that all the plaintiffs, or those under whom they claim, and whose estates they hold, have enjoyed, at their respective houses, the use of the water of this spring, for more than twenty years before this controversy commenced; and that it has, during all the time they have so used it, been brought through the land formerly owned by Stevens, and now held by the defendant. To the houses of some of the plaintiffs it had thus flowed for the term of near forty years. And during all that time those who have thus received the use of it after it passed the lot now owned by the defendant, have exercised the right of repairing the aqueduct, not only from that lot to their respective residences, but also in that lot, and from thence to the spring from which it is taken. During all that time the right of the plaintiffs, and those under whom they hold their lands, thus to take and use the water, has, so far as appears, not been contested by any one; nor is there any express evidence of any permission asked within the time, or of any sum paid for the use, or any acknowledgment that the use was at the pleasure of those through whose land the aqueduct passed.

These facts, if they stood alone, would furnish abundant evidence of title in the plaintiffs to take and use the water as they, and others whose estates they hold, have been accustomed to do for such period, and to ask the aid of the court: *Finch v. Resbridger*, 2 Vern. 390; 2 Cowen's Ph. Ev. 381, citing *Gilb. Eq. 4*, etc., 2 Story on Eq. 204, 207. But there are other circumstances to be considered upon which the defendant relies, as showing that the use was not in fact adverse to the right he now sets up in the owners of the Stevens lot, to control the use of the water at their pleasure.

It appears that in 1829, the aqueduct was out of repair, and measures were taken to relay it in a more durable manner. Abel Bellows then had charge of the Stevens estate, and he declared that those who did not join in making the repairs would lose their chance to have the

water. But this does not show an assertion of a right to deprive them of it at the pleasure of those of whose estate he then had the charge. It was for the interest of that estate to have the repairs made, as the water there used was obtained by means of the aqueduct; and it seems therefore rather a call upon those who were supposed to be bound to make the repairs, and who of course had the right so to do, to perform a duty from which the Stevens estate, as well as themselves, would derive a benefit. If the testimony, upon the whole, shows such a use as to be evidence of a grant of the right to take the water on condition of keeping the aqueduct in repair, and permitting the occupants of the Stevens estate to take so much as they needed, or have been accustomed to do, then Mr. Bellows well declared the law, that those who did not comply with the condition upon which they held the right would lose the right itself.

It appears further, that during the time Bellows thus had charge of the estate for the heirs, the plaintiff Watkins applied to him to get a conveyance of a right to use the water. It does not appear that he admitted that he had no title, but the water was conveyed to his house somewhere from 1810 to 1816; and if this transaction took place within the term of twenty years after, it would be evidence of an admission that he at that time had no title, and thus might bind him, if he alone were concerned, on the ground that there was no sufficient evidence that he had had the use of the water adversely for the term of twenty years. If he had enjoyed the use adversely for a period of twenty years before the application, the case would be different, as we shall see hereafter. But none of the other plaintiffs appear to have had any connection with that application, and Watkins derives his use of the water, not immediately from the land of the defendant, but through other persons, who have had the use longer, and whose rights may perhaps inure to his benefit upon this occasion. * * *

Nor can the conversation at the auction affect the rights of the plaintiffs, although it appears that some of them were present. A. Bellows stated the facts, and said he did not know whether the plaintiffs could hold the water. Lyman, the agent for making sale, said they could not, as the repairs were in the nature of rent. But being asked whether he would give a deed with warranty, he said he should sell only the right of the heirs and that was all that he sold and attempted to convey. His previous declaration, that the plaintiffs could not hold, could not operate to enlarge the right of the heirs; and those of the plaintiffs who were present at the time cannot be estopped from claiming what he did not sell upon that occasion. If there had been a

distinct sale of all the spring, and the right to control the water at pleasure, Mrs. Bellows, who was not present, would not thereby be estopped from asserting a right to have the water flow to her house, in the manner it had been accustomed to do for near forty years; and so long as it thus flows there, she may permit those who have continued the aqueduct from that place, to continue the use of the water, even if, by reason of their having been present at the sale, they could not assert an independent right against the defendant. In order to estop a party from asserting a title, by reason of his presence at a sale without having made any objection, the subject-matter of the sale must be something in which his interest is direct and immediate. If there be an intermediate interest, upon which his depends, and that interest is not affected, he cannot be estopped.

The repairs made upon the aqueduct, without evidence of some agreement to that effect, cannot be regarded in the nature of rent, or as an acknowledgment of a holding at the pleasure of the owner of the land through which it is laid. The fact of repairing, standing alone, is rather the assertion of a right to enter upon the land where the aqueduct is laid, for the purpose of doing an act beneficial to the party entering, than the performance of a duty to the owner of the land, or an acknowledgment of a tenancy, or use, at will under him. It must clearly be regarded as the assertion of a right adverse to the owner of the soil, were it not that, in this case, the owners of the Stevens place had a beneficial interest in the repair, along with the others, by reason of the use which they had of the water. But this, again, cannot show that those who made the repairs were holding the use of the water at the pleasure of him in whose land the repairs were made, and who also had the use of it. It may serve to show that they held the use, and the right to enter and repair, upon the condition of furnishing the owner of the land with a certain quantity of the water, or such quantity of water as he was accustomed to take; and the performance of the condition may be essential to the continuance of the right.

A grant, upon condition that the grantee shall perform certain acts, may be presumed from a usage of more than twenty years to exercise the right adversely, and perform the duty connected with it, as well as an absolute grant may be presumed from the exercise of a right during that period, without any performance of a duty to the owner: *Mitchell v. Walker*, 2 Aik. 266, 270 (16 Am. Dec. 710). Prescriptions may be upon condition: *Grey's Case*, 3 Co. 79; *Lovelace v. Reynolds*, Cro. Eliz. 546, 563; *Brook v. Willet*, 2 H. Bl. 224, 234. And there seems to be no valid reason why usage might not show a grant of a perpetual

right, upon the condition of the payment of an annual sum, or rent. Such grants are legal, notwithstanding recent circumstances are showing them to be inexpedient where they embrace large tracts of land.
* * *

But it is further objected, that the heirs of Cochran were minors at the time of his death, and that one of them had not arrived at full age when the sale was made to the defendant; and the defendant contends that no title could accrue or be shown from evidence of a use during this period, on account of this disability. The plaintiffs answer to this, that there was the care of guardians to protect the rights of the minors, and that a prescription is not affected by the circumstances that a party against whom it operates is an infant. But the plaintiffs' claim does not rest upon a prescription. There is no pretense that the use has extended beyond the time of memory; and we are of opinion that had there been no sale to the defendant, Elizabeth Cochran, whose minority continued up to the sale, might, on arriving at full age, have successfully contested the right of any of the plaintiffs, if they could not have shown a use of the water by some of them, or those under whom they claim, for a period of twenty years before her right accrued. The plaintiffs must rely upon the presumption of a grant, arising from an undisturbed enjoyment of the use of it, flowing through the land owned by the defendant, for so long a period; which may be in the nature of a prescription, except so far as time is concerned. But notwithstanding the remark of Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 402, we are of opinion that no grant can be presumed from an adverse use of an easement in the land of another, for the term of twenty years, where the owner of the land was, at the expiration of the twenty years, and long before, incapable of making a grant, whether the disability arose from infancy, or insanity: See *Guernsey v. Rodbridges*, Gilb. Eq. 3; cited 2 Cowen's Ph. Ev. 383.

Perhaps a disability intervening during the lapse of the term, but not extending to the termination of the period of twenty years, might not be sufficient to rebut the presumption; but it would be absurd to presume a grant, where it was clear that no such grant could have existed. And in this case a grant by a guardian, of an easement in the land of his ward, extending beyond the limit of the guardianship, is not to be presumed; because a guardian is not authorized to grant such incorporeal hereditaments out of the land of the ward. Nor can any grant from Cochran himself to Gage, Watkins, or Buffum, be presumed; because there was no use by either of them for the term of twenty years before his death, and the neglect of his minor child to

assert a right cannot raise a presumption of a grant by him. If, therefore, the other heirs were barred from contesting the right of the plaintiffs, because the circumstances warranted the presumption of a grant from them, a successful resistance on the part of their co-heir, Elizabeth, might have precluded the plaintiffs from the use of the water, on account of the indivisible nature of the right to keep the aqueduct there, and to draw the water through the land in which she had an interest; at least, this might be so until some partition of the estate, by which the portion of the land through which the aqueduct passes should be assigned to the others. The guardian of Elizabeth joined in the sale, but it was to sell her undivided interest, and we are of opinion that this does not merge the right which she had to controvert the title of the plaintiffs, and that the defendant, in virtue of the purchase of her individual share, may exercise any rights to which she was entitled.

Against her, then, some of the plaintiffs could not maintain a right, if the matter stood upon their use of the water alone, because there is no pretense that they had had a use of it for twenty years prior to the time when her right accrued and her disability existed. But these plaintiffs, with the exception of Buffum, take the water not directly from the Stevens lot, but from the land of Mrs. Bellows; and if, as before suggested, she can maintain a right to have a certain quantity of water run to her land, through the aqueduct, she may use it, or permit others to use a portion of it, or let it run to waste. The defendant, in virtue of the title of Elizabeth Cochran, has no right to object that they are not entitled to the use, so long as she permits it. And this brings us to the question whether the case shows a use of the water by her, and those under whom she claims, for the period of twenty years prior to the death of Cochran.

There is a great want of precision in fixing dates, throughout the whole testimony. Some of this may have been unavoidable, from lapse of time and the nature of the case. In some instances, the time might, undoubtedly, have been fixed with greater accuracy. When we come to inquire respecting the time that Townsley first brought the water from the Stevens place, which was the commencement of the use on which the plaintiffs rely, the evidence is, that he moved into the house now occupied by Mrs. Bellows about the year 1796 or 1797; and that the water was taken from the "Stevens house," to the "Sarah Bellows house," within one or two years after he moved into it, as the witness believes. The logs were laid down by Townsley, and by Joseph Wells, who then occupied the "Mead house," to which the

water was carried at the same time. This testimony stands uncontradicted; and, upon any reasonable construction of it, the water must have been taken to those houses prior to the year 1800: *Cutts v. King*, 5 Greenl. 482. It was carried from the house occupied by Mrs. Bellows before Townsley left it (which was in 1812), to Gage's, and continued on to Watkins, somewhere about that time. This was the situation of it at or about the time Cochran purchased the Stevens lot, and thus it continued, without objection on the part of anyone, up to the time of his death, which, according to the testimony, took place in 1820 or 1821. From the time the aqueduct was thus continued on beyond the Stevens place, those who took it, and had the use of the water, repaired the aqueduct, not only from their places of residence to that place, but beyond, to the spring. It seems clear, then, that for more than twenty years prior to the decease of Cochran, the water had been accustomed to run to the premises now owned by Mrs. Bellows and Mead, and that the owners and occupants of those estates had the uninterrupted use of it, and had also exercised the right of making repairs on the aqueduct. The presumption of a grant, to the extent of the use thus shown, arises before the decease of Cochran; and the right of Mrs. Bellows and Mead to have the water flow as it had been accustomed to do, to their lands, is not impaired by the decease of Cochran, and the minority of any of his children. * * *

Upon the principles which have thus been stated, the right set up by the plaintiff Buffum is not maintained, as the branch of the aqueduct to his house is not dependent upon that which runs to the house of Mrs. Bellows, but is taken directly from the land of the defendant, and his use of the water commenced but a few years before the decease of Cochran. As to his heirs and representatives, therefore, who have come in as parties, the bill must be dismissed.

As to the other parties, let the case be committed to a master, to report what quantity of water usually flowed to the houses of Mrs. Bellows and Mead for the term of twenty years prior to the decease of Cochran, and what was used at the premises of the defendant.

THOMPSON v. GREGORY.

4 *Johns. (N. Y.)* 81; 4 *Am. Dec.* 255. (1809)

Action on the case for erecting a dam on a stream of water running through plaintiff's land, and so near his land as to overflow the same. It appeared in evidence that plaintiff's land was overflowed every season by the stream at high water before the dam was built, but that defendant's mill and dam below prevented the water from running off as formerly, thereby destroying the use of the land as a meadow. The defendant produced a lease, dated January 7, 1797, from the proprietor of the manor to one Griggs, of about eighty-six acres, including the premises of the plaintiff and those of defendant where the bark-mill stood. In March, 1806, Griggs conveyed forty acres to S. Gregory, under whom defendant held by a parol agreement. The lease to Griggs contained the following exception: "excepting and reserving out of the grant, unto the grantor, his heirs and assigns, all mines, etc., and all streams and runs of water upon the premises, with the soil under the same, and the right and privilege of erecting upon any part of the premises, mills and dams, etc., for the use of the grantor, etc., and also such part of the said land as may by the said dams be overflowed with water, etc., and also free ingress, etc., for the purpose of, etc., the grantor, his heirs and assigns, making a due abatement in rent for the lands which he shall so use and occupy." The defendant objected that the lands of the plaintiff so overflowed were included in the exception, and did not pass by the grant, and that plaintiff could not maintain this action. The objection was overruled, and defendant then offered to prove by the testimony of S. Gregory that witness had permission of the original grantor to erect a mill and dam on the stream, by virtue of which defendant built the dam in question. It appearing that the fee of the land was still in S. Gregory, he was rejected as a witness, and although he offered a release of his right to the defendant, he was ruled incompetent. The jury found for the plaintiff.

A motion to set aside the verdict was made, and the cause submitted to this court without argument; the points raised were upon the construction of the exception, and as to the competency of S. Gregory as a witness.

By Court. This case is submitted without argument, and the counsel for the defendant has stated several points, as reasons for setting aside the verdict and awarding a new trial.

It is contended that the plaintiff had no interest in the lands overflowed by the mill-dam, as they were embraced by the exception or reservation contained in the original lease to Griggs. The lease excepts and reserves all streams, and the soil under them, with the right to erect mills, and mills-dams, and it then excepts and reserves the land which may be overflowed in consequence of such dams. But until the grantor has exercised his right to erect mills and mills-dams, it cannot be ascertained what lands will be overflowed, and the reservation is in the meantime inoperative, and considered strictly as an exception in the deed, it is void for uncertainty. It must be construed in relation to the subject-matter, and it is like the right to erect mills and to have ingress to them, the reservation only of a right to use the lands so conveyed for such a specific purpose. The direct interest in the soil, in the meantime, passed by the deed; and the plaintiff can well maintain the present action, so far as respects his interest in the premises.

2. The next, and the principal point in the case, relates to the matters set up as a defense, and to the competency of a witness who was offered to prove it. The defense was, that the mill and mill-dam were erected by permission of Stephen Van Rensselaer, the original grantor, and Stephen Gregory was offered as a witness to prove this permission. He was objected to and rejected, but the plaintiff, at the same time, offered to admit in evidence any permission in writing from the grantor. It is not necessary to examine whether the witness was or was not competent, because, assuming him to have been so, his testimony would have been of no avail, since the right in question could not pass by parol. The right reserved by the lease to the grantor, and his heirs and assigns, to erect mills or mill-dams, was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. The appropriate subject-matter of grants is these incorporeal rights, of which livery cannot be had; and a grant is, in general, good only by deed. This was the rule of the common law, and were it otherwise, no such interest could be assigned or granted, without writing, according to the express provision of the statute of frauds. The court are of opinion, therefore, that the motion on the part of the defendant be denied.

BONELLI BROTHERS v. BLAKEMORE.

66 *Miss.* 136; 14 *Am. St. Rep.* 550; 5 *So.* 228. (1888)

COOPER, J. In the year 1849 one Emanuel became the owner of a part of square 258 in the city of Vicksburg, which square is bounded on the east by Washington Street, and on the north by Grove Street. His lot fronted on Washington Street, and extended back one hundred and three feet on Grove Street. On this lot he erected two store-houses, each fronting on Washington Street, and extending back eighty-eight feet, leaving a vacant space in rear of the buildings of fifteen feet. The declivity from Washington Street westward is so great that what is the basement of the buildings in front is above ground, forming the lower story in rear. The buildings are, therefore, three stories in rear, and two stories and a basement in front. One of these buildings extended along Grove Street, and there was a door in the side opening out on Grove Street, by which access was had to the lower story or cellar. This is designated as lot 91 in the pleadings and evidence. In the rear of the other building (93) there was a door leading from the first floor to the vacant space. In front there was in each building a stairway leading to the basement; the two buildings had one common hall. In 1859 Emanuel made contemporaneous conveyances,—one to Duff, Green, & Co., of lot 93, the other to Cobb, Manlove, & Co., of lot 91. The conveyances were of the lots by metes and bounds describing the land on which the respective buildings stood and the vacant space in rear of each, granting to each purchaser the lot and its appurtenances.

Cobb and Manlove believed that by reason of the situation of the lot conveyed to Duff, Green, & Co., its owners had a right of way across lot 91 to reach Grove Street, and Duff, Green, & Co., being under the same impression, exercised the privilege of passing across said lot so long as the two firms occupied the buildings. In 1859 or 1860, each firm, desiring to enlarge its building, the second and third stories were extended back to the rear of the lot, but an archway was cut in the wall of building 91, where the vacant space opened out on Grove Street, and a corresponding arch was also cut in the partition wall, the lower story not being extended in either building. Duff, Green, & Co. still had access to the first or cellar floor, by driving drays, etc., through the archways to the rear of their building. In 1863 lot 91 was bought by one Barbour, who was examined as a witness, and testified that at that time Duff, Green, & Co., having engaged in a business

that did not require the use of the cellar, made no attempt to use the way across lot 91, and that they set up no claim to a right so to do. Some time after this purchase and occupancy by Barbour, he built a stable in the alleyway on his lot, the arched way on Grove Street being used as the doorway to his stable. Things remained in this condition until 1871, when another occupant having moved into lot 93, with whom Barbour was not on friendly terms, he closed up the archway in the partition walls by nailing plank across the same. After this, the appellant Bonelli became tenant of both buildings, and tore out the stable erected by Barbour and built another one, which was partly on lot 91 and partly on lot 93. Bonelli has now become the owner of lot 91, and has torn down the stable erected on both lots by himself and nailed up the archway in the partition wall. Complainants, who are the owners of lot 93, exhibited the bill in this cause to enjoin him from obstructing the way which they claim to have across lot 91 to Grove Street.

There is no distinct averment in the bill that the way claimed ever was used by Emanuel during his ownership of the property, but since a decision against complainants on this ground would probably result in an amendment of their bill, and since, in any event, they are not entitled to the relief asked, we deal with the cause as though the allegation of such use had been specifically made.

Complainants contend that a right of way exists, first, by implied grant in the conveyance from the common owner to Duff, Green, & Co., or if this point be decided against them, then that Duff, Green, & Co., under whom they claim, secured the right by parol from Cobb, Manlove, & Co., and if mistaken in this, then they claim that the right has been acquired by prescription.

The second and third propositions may be disposed of in a word. A way is an incorporeal hereditament, and since livery of seisin could not have been made of it at common law, it could only be created by deed or other writing; it is therefore said to lie in grant: *Greenleaf's Cruise on Real Property*, tit. Deed, c. 4, secs. 35, 36.

But a right of way is an interest in lands, and a grant by parol is obnoxious to the statute of frauds: *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Richter v. Irvin*, 28 Ind. 27; *Hall v. McLeod*, 2 Met. (Ky.) 98; 74 Am. Dec. 400; *Kerr on Statute of Frauds*, sec. 718.

The authorities cited by counsel for appellees are cases of dedication of public ways, and rest upon the doctrines of estoppel *in pais*. They are not required to be in writing.

The evidence does not support the claim of a way by prescription.

It does not appear that the right was exercised for an uninterrupted period of ten years at any time.

The proposition most confidently advanced by appellees is, that the way passed to Duff, Green, & Co., either as a part of the land conveyed, or as a necessary incident thereto, by implied grant, or that it passed by use of the word "appurtenances" in the deed.

The use of the word "appurtenances" adds nothing to the force or effect of the deed. Emanuel was the owner of the whole property, and as owner exercised the right of passing across one part in use of the other; but the right was not an easement appurtenant to the land, for no man can have an easement in his own property. If Emanuel, as owner of this property, had also enjoyed a right to pass over the property of another person, such right would have been an easement, and would have passed by the grant of the property and its appurtenances. But the use of that word proper to convey an easement already existing is not sufficient to evidence a purpose to create an easement when none existed before. If by the conveyance to Duff, Green, & Co., an easement was granted at all over the other lot, it must be implied from the general grant, and not from the use of the word "appurtenances"; *Wally v. Thompson*, 1 Bos. & P. 375; *Oliver v. Hook*, 47 Md. 301; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Parsons v. Johnson*, 68 N. Y. 62; 23 Am. Rep. 149.

The principle from which the doctrine of implied grants of easements over other lands of the grantor springs is said to be found in the maxim that "one shall not derogate from his grant," and the kindred one that the purchaser takes the land bought, and whatever right in the hands of the grantor as is necessary to its enjoyment.

If one sells to another a tract of land surrounded by other lands of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied from the grant made. And to this extent are all the authorities.

So when a conveyance is made of real estate by designation, and not by metes and bounds, as the manor of A, or as Blackacre, or when property devoted to a trade or business, as a mill or tan-yard, is conveyed by words describing the property as such, other land than that covered by the building or curtilage, that by its use has become essential to the enjoyment or use of the buildings, passes to the grantee. But land cannot be appurtenant to land, and such other lands pass, not as appurtenant or incident to thing granted, but as a parcel of the thing itself.

In the case of a way by necessity, it is implied as an incident to the

thing granted; when the conveyance is of the land by designation, not by metes and bounds, the connected lands pass, not strictly by implied grant, but as included as a part of the thing expressly granted. The authorities run in an almost unbroken current in support of the right of the grantee under the above-named circumstances, but some diversity is encountered when we pass into the field of implied grants of things not necessary (strictly necessary), but only highly convenient, or essential to the full enjoyment of the land bought.

The owner of a tract of land, a part of which he afterwards grants to another, has not, of course, any easement in any part of his land while he owns the whole; he deals with it as owner, and may subserve any portion to the use of the other, and may change the arrangement at his will; it is only where such arrangement is apparently permanent, and intended so to be, and while so remaining the owner grants a part of the premises, that the question of easement or servitude can arise. The condition of the whole when the severance is made, the nature of the easement claimed to be granted or reserved by implication, its obviousness and continuouſness, are the tests usually applied to determine the existence or non-existence of the grant or reservation.

The rule seems to be of very general recognition that an easement not of strict necessity does not pass by implied grant, unless it be apparently permanent, obvious, and continuous.

The word "continuous," in the sense here used, seems to have acquired a somewhat unusual significance within the meaning of the rule. It is not sufficient that the thing may be continuously subject to use or enjoyment, but that it may be used without the intervention of the act of man.

A continuous easement is one, say the authorities, which may be enjoyed without any act on his part, as a waterspout, which discharges the water whenever it rains; a drain, by which surface water is carried over land; windows, through which light and air enter, etc.

A non-continuous easement is one to the enjoyment of which the act of the party is essential, and of this class a way is the most usual: *Lampman v. Milks*, 21 N. Y. 505; *Poden v. Bastard*, L. R. 1 Q. B. 156; *Providence Tool Co. v. Corliss Steam Co.*, 9 R. I. 564; *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750, and note; *Duston v. Ledden*, 23 N. J. Eq. 64.

The decided weight of authority, both English and American, is to the effect that an easement, not of strict necessity will not pass by implied grant, unless it be apparent and continuous: *Whally v. Thompson*, 1 Bos. & P. 371; *Pheysey v. Vickery*, 16 Wood. & M. 484;

Goddard on Easements, 266 *et seq.*; Oliver v. Hook, 47 Md. 302; Fetters v. Humphreys, 19 N. J. Eq. 472, and cases cited above.

In Pennsylvania, a way fenced out, and devoted exclusively to purposes of travel, seems to be treated as a continuous easement: Phillips v. Phillips, 48 Pa. St. 178; 86 Am. Dec. 577; and an alley-way: McCarthy v. Kitchenman, 47 Pa. St. 239; 86 Am. Dec. 538. It is probable, however, that in that state the decisions go further, and establish the rule that a way, commonly and usually used, and highly convenient, would pass by implied grant: Pennsylvania R. R. Co. v. Jones, 50 Pa. St. 417. It was also suggested in Watts v. Kelson, L. R. 6 Ch. 186, that a paved roadway might pass by implied grant. In United States v. Appleton, 1 Sum. 492, Judge Story, not adverting to the distinction between continuous and non-continuous easements held that where a window, opening upon a porch, had been in use as a way by the grantor across the porch to the street, an easement passed by implied grant, not only to light and air, but to the way across the porch. The authorities relied on by him are cases in which continuous easements had been held to pass. It may be noted that the cases cited by him from Massachusetts have been practically overruled in that state by subsequent cases. The law seems to be in that state now that no easement, whether continuous or non-continuous, will pass by implied grant, unless it be one of necessity. Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 80.

Since the way claimed by complainant is not one of necessity, and is not of a continuous nature, it did not pass by the conveyance to Duff, Green, & Co., and of course has not been acquired by any of the subsequent conveyances under which complainants derive title. The complainants are therefore not entitled to the relief sought, wherefore the decree is reversed, and bill dismissed.

NOTE: See text of Tiffany on Real Property (2nd Ed.) p. 1281, as to the statement that the easement must be apparent and continuous.

WOOD v. GRAYSON.

22 App. D. C. 432. (1903)

Note: In the case of *Wood v. Grayson*, 22 App. D. C. 432, it was said:

* * * "It is certainly a well settled principle, indeed not questioned, that a good title to the passage of light and air to windows may be given by grant or express agreement; and it being a well-settled rule of construction that the grant of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted, for the purpose for which, according to the obvious intent of the parties, the grant was made; and that a grant is always to be taken strongly against the grantor, it would appear that the right to light and air would pass upon the conveyance of the building, under the circumstances, by the grant itself, where, as in this case, light and air is apparently necessary, even without any special words of conveyance. *Pomfret v. Ricroft*, 1 Saund. 320, and notes; *Brackisley v. Whieldon*, 1 Hare, 176, 180. But, without deeming it necessary to apply the principle as thus broadly stated, the deed of trust to Grayson and Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, rights, and privileges, as appurtenant to the said building. This is the clear import of the deed of trust. It is true, the deed, by its terms, does not limit the extent of the right of easement of light and air over the adjoining ground on the south and west sides of the building, but the acts and dealings with the subject by Haller, Wood, and Talbott, would clearly indicate that they found that a strip or space 10 feet wide on the south and west sides of the Victoria Flats building was reasonably necessary to supply the light and air to the rooms and apartments on those sides of the building. It is competent to arrive at the necessary extent of the space or area by what the parties have done in regard to it, and what they have recognized as reasonably necessary in actual use. *Hall v. Lund*, 1 Hurl. & Colt., 676, 683." * * *

KEATING v. SPRINGER.

146 Ill. 481; 22 L. R. A. 544; 37 Am. St. Rep. 175; 34 N. E. 805.
(1893).

Assumpsit for use and occupation of certain premises in the city of Chicago, described in the case as follows: "all those premises situate * * * in the city of Chicago * * * known and described as follows, to wit: The basement of the building known as Nos. 201, 203, and 205 So. Canal street, Chicago, being a space 50 feet by 70 feet, more or less; also the store floor of part of said building, and known as Nos. 201 and 203 So. Canal Street, being a space 50 feet by 50 feet, more or less; also a space in the yard at the rear of said building commencing at the N. W. quarter of said building, then west 25 feet, then south 25 feet, then east 25 feet to building, together with steam-power not to exceed ten horse-power, said steam-power to be furnished ten hours per day, Sundays and holidays excepted; said premises hereby leased to be used and occupied as a marble works and kindred business, and in no manner as to damage or interfere with tenants of adjoining property." In the lease was the following stipulation: "Party of the first part (Springer) shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises; and party of the second part shall at all times have the use and free access through all now existing alleys leading to rear of said premises." The demised building was of two stories and ran back fifty feet from the street, the remainder of the lot being the open space referred to in the lease. There were windows on every side of the house, and at the date of the lease the adjacent land was vacant, the nearest building being about thirty feet distant. In 1885, the year after the lease was executed, the landlord erected a five-story building, the north wall of which was immediately contiguous to the south wall of the leased building. The new building ran back seventy-five feet from the street, overlapping the leased building towards the rear by twenty-five feet. Evidence was also introduced, showing that the landlord had erected boiler and machine shops in the rear of the leased building, and placed various obstructions in the alleys and space to the rear of said building. Besides the suit in assumpsit, the lessor brought suit upon a note alleged to have been given for rent, and instituted three proceedings of distress for rent. The lessee also brought an action on the case to recover damages for the obstruction of his

lights by the new building. The special pleas filed to the suit on the note and in the distress proceedings alleged that the covenants in the lease had been violated by the erection of the new building and by the other obstructions above referred to. All the suits were eventually consolidated and tried together. The plaintiff proved that no rent had been paid from October, 1887, to July 17, 1888, and also introduced in evidence, against the objection of the defendant, the record of a judgment in a forcible entry and detainer suit by which the plaintiff was declared to be entitled to the possession of the leased premises. Springer had judgment for two thousand nine hundred and seven dollars and fifty cents against Keating, and, in the action on the case for the obstruction of Keating's light, Springer was found not guilty.

MAGRUDER, J. In this case many questions of fact and law are discussed by counsel in their briefs, but the record is not in such shape as to authorize us to consider any of these questions, except that which arises out of the refusal of the trial court to admit certain offered evidence, as hereinafter stated. The trial was, by agreement, before the court without a jury, and resulted in a judgment for the plaintiff, which has been affirmed by the appellate court. The judgment of the latter court is conclusive as to the findings of fact. No "written propositions to be held as law in the decision of the case" were submitted to the court on the trial below by either side, in accordance with section 42 of the Practice Act; and hence no question of law is presented for our determination, unless the errors assigned as to the admission or exclusion of evidence necessarily involve the consideration of such a question: *First Nat. Bank v. Haskell*, 124 Ill. 587; *Myers v. Union Nat. Bank*, 128 Ill. 478; *Hall v. Cox*, 144 Ill. 532.

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble as appellant was engaged in, and that the demised premises were selected by the appellant for that business, mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly, the defendant below offered to prove that the erection of the Springer building on the south side of the Keating building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff the court refused to receive the testimony, and an exception was taken to its ruling by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease, obligating the landlord to permit the light to pass over the south lot into the leased premises.

The English doctrine is that, "If one who has a house with windows

looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows: Washburn on Easements and Servitudes, page 492, par. 5. This doctrine, however, does not prevail in the majority of the American states. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon, if he has permitted the light and air to pass over it into the windows of his neighbor's house situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription: 2 Woodfall's Landlord and Tenant, page 703, and notes; 1 Taylor's Landlord and Tenant, secs. 239, 380, and notes; Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 80; Mullen v. Stricker, 19 Ohio St. 135; 2 Am. Rep. 379. In the early case of Gerber v. Grabel, 16 Ill. 217, this court held that such a right might be so acquired, but in the later case of Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570, the Gerber case was, in effect, overruled; and it was held that "a prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," * * * "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law."

It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of a grantor, and that where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property: Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 80; Mullen v. Stricker, 19 Ohio St. 135; 2 Am. Rep. 379; 1 Wood's Landlord and Tenant, sec. 209, pp. 422-424, and note; Morrison v. Marquardt, 24 Iowa, 35; 92 Am. Dec. 444. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other." 2 Woodfall's Landlord and Tenant, 703, and note. "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of an-

other": *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Haverstick v. Sipe*, 33 Pa. St. 368; *Keiper v. Klein*, 51 Ind. 316.

It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so; *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sand. 316; *Keiper v. Klein*, 51 Ind. 316; 2 *Woodfall's Landlord and Tenant*, 703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement: *Hilliard v. New York etc. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; *Brooks v. Reynolds*, 106 Mass. 31; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444.

The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises * * * described as follows"; and then mentions, as constituting those premises: 1. The basement; 2. The store floor; "also a space in the yard at the rear" twenty-five feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than twenty-five feet to the west line of the demised space west of the Keating building, which space was twenty-five feet wide from east to west. The Springer building was seventy-five feet deep, while the Keating building was only fifty feet deep. It follows that the extension of the former west of the rear of the latter was south of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard; and consequently the whole of the Springer building was south of the demised premises. Hence, we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing

the language of the provision as to limit it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said premises; that is, to said space in the rear as well as to said building. The Springer building—a brick structure five stories high—was so constructed that its north wall joined the south wall of the Keating building and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered. * * *

GEIBLE v. SMITH.

146 Pa. St. 276; 28 Am. St. Rep. 796; 23 Atl. 437. (1892)

STERRETT, J. After some progress had been made in the trial, the parties, by writing filed, agreed to dispense with the jury, and submitted the decision of their cause to the learned president of the common pleas, who, after full hearing, found the facts, decided the questions of law arising thereon, and directed judgment to be entered in favor of the defendants for costs, which was accordingly done. The findings of fact and conclusions of law are fully set forth in the opinion. An examination of these, in connection with the evidence relating thereto, has satisfied us that there is no error in either that calls for a reversal of the judgment.

It is unnecessary to refer at length to the facts relating to the easement, etc., which is the subject of this contention. It appears, *inter alia*, that Charles Duffy, owner of a lot fronting thirty-four feet on South Main Street, in the borough of Butler, improved the same in 1878, by erecting on the front thereof a two-story brick building, divided by a wall extending from foundation to roof. The first story was arranged for two separate storerooms; the second for other purposes. In erecting these buildings, Duffy, in connection with Ruff, who owned the adjoining lot on the north, constructed a stairway,

with hall at the head thereof, for the purpose of reaching the second story of their respective buildings, each contributing to the space necessary for that purpose. That stairway and hall, and a hall leading therefrom across the second story of Duffy's buildings to the south line thereof, were continuously used by the tenants of the second-story rooms, as their only means of ingress and egress, from the time the buildings were completed until the bringing of this suit. No other provision was ever made for reaching the second story of either of the buildings.

In 1879, after completion of the buildings, Duffy sold and conveyed to plaintiff the storeroom or building on the northerly side of the lot and adjoining Ruff, on which said stairway and halls were constructed. Plaintiff thereupon went into possession, and never questioned the right to use said stairway and halls for the purpose of ingress and egress to and from the second story of the other building, until after the same was purchased by and in the possession of the defendants, to whom Duffy conveyed in 1890. From the completion of the buildings in 1879, until after defendants purchased and went into possession of the southerly building, the "union" stairway, as it is called by the court below, and halls, were continuously, openly, and peaceably used by all the occupants of the two buildings. With full knowledge of the easement or servitude thus imposed upon the northerly part of the lot, for the common use and benefit of both buildings, the plaintiff purchased and took possession of the same. With like knowledge, and with no notice, actual or constructive, to the contrary, defendants bought and went into possession of the southerly building. In such circumstances, the plaintiff is not in a position to question the right of defendants to use the stairway and halls; and on principle as well as authority, the learned judge was right in so holding.

It is well settled, that on the conveyance of several parcels of land, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents, of property which have been created or used by the vendor during the unity of possession, though they could not then, from his general ownership, have a legal existence: Washburn on Easements, 73; Goddard on Easements, 119. Where a continuous and apparent easement or servitude is imposed by the owner of real estate on a part thereof for the benefit of another part, the purchaser at private or judicial sale, in the absence of an express reservation or agreement, takes the property subject to the easement or servitude: Cannon v. Boyd, 73 Pa. St. 179; Overdeer v.

Updegraff, 69 Pa. St. 110; Zell v. Universalist Soc., 119 Pa. St. 390; 4 Am. St. Rep. 654; Pierce v. Cleland, 133 Pa. St. 189.

Further comment is unnecessary. Neither of the specifications is sustained.

MITCHELL v. SEIPEL.

53 Md. 251; 36 Am. Rep. 404. (1879)

MILLER, J. This action was brought in December, 1878, by the appellee against the appellant to recover damages for closing and obstructing an alley between two houses then separately owned by the respective parties. The case presents an important and interesting question respecting the law of easements.

The facts necessary to be stated, and about which there is no dispute are these: In the year 1839, Daniel Collins became the owner under a lease for ninety-nine years renewable forever of a lot of ground in the city of Baltimore, fronting thirty feet on West street, and extending back eighty feet to Gould lane, a public alley, twenty feet wide. The lot was then vacant, but soon after his purchase Collins erected thereon two brick houses fronting on West street. These houses were built about the same time, the first having a front of fifteen feet, and the second a front in the lower story of twelve feet and six inches, and in the upper stories of fifteen feet, thus leaving an alley of two feet and six inches between them, covered by the joists which supported the second floor of the second house. These joists projected over the alley and into the adjoining wall of the first house. The alley thus covered was open to the street; and extended back between the houses about thirty feet. At its inner terminus two gates were placed, which opened respectively into the rear premises and yards of each house, and it was used by the occupants of each as a common passage-way to and from the street. Each house had as usual a front door opening upon the street, and from the end of the alley a fence was built which extended back to Gould lane, and divided the lot into two parts, giving to each a width of fifteen feet. During his life, Collins continued the owner of the whole property and occupied one of the houses. After his death his widow became the owner under his will, and so continued until the year 1865, when by an order of the Orphan's Court, and in pursuance of a power contained in the will, the executor of Collins sold and conveyed the entire property to George T. Waters.

While the unity of possession thus continued, it is very clear no easement in respect to this alley existed. A party cannot have an easement in his own land, inasmuch as all the uses of an easement are fully comprehended in his general right of ownership. *Oliver v. Hook*, 47 Md. 308. But this unity of ownership was severed on the 8th of June, 1865, by Waters, the owner, who on that day sold and conveyed the second house and lot to George W. Chandler, from whom the defendant, through several *mesne* conveyances, derived his title to the same. This conveyance was an absolute and unqualified grant, describing the property by metes and bounds, which included the whole of this alley, and contained no reservation of the right to use the same for the benefit of the house and lot retained by the grantor. Waters retained ownership of the first house and lot until the 29th of July, 1868, when he sold and conveyed the same to the plaintiff by a similar grant, which embraced no part of the alley. The defendant obtained his title to the second house and lot (as before stated by *mesne* conveyances from Chandler, the first grantee thereof), in October, 1874, and shortly before this suit was brought, prevented the plaintiff from using the alley, by placing upon it buildings and other obstructions. There is no pretense that the plaintiff had acquired a prescriptive right to use the alley, nor is the case complicated by any easements of drainage or sewerage. There are no pipes or drains, either underground or otherwise, from one house to the other, and thence to a common outlet, nor does the surface drainage pass through the alley. The proof shows that the natural flow of surface water, and that from the hydrants on both premises is in the opposite direction, toward and to Gould lane. The alley was therefore simply a convenient passage-way. Without doubt it was open and apparent, and was made and designed by Collins, for the common use and benefit of both houses, and was in fact so used by the occupants of both, until obstructed by the defendant, but it is equally clear that Collins and those who succeeded him in the ownership of both could have closed it, and rearranged the premises at pleasure. The real question in the case then is: Does the law attach to the unqualified grant in 1865, from Waters to Chandler, of the second house and lot, by metes and bounds, which include the whole of this alley, an implied reservation of the use of it for the benefit of the house and premises retained by the grantor? Upon this point, our investigations have led us to an examination of the large number of authorities cited by counsel, as well as many others, and upon no question have we found so great a contrariety of judicial opinions and *dicta*, if not of actual decisions.

There is a general concurrence of authority, both in England and in this country in support of the proposition, that on the grant, by the owner of a tenement, of part of that tenement as it is then used and enjoyed, that will pass to the grantee all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant used by the owner of the entirety for the benefit of the part granted, and so it was decided by this court in *Janes v. Jenkins*, 34 Md. 1. But the question here is, whether upon such a grant, the law will engraft a reservation of such easements in favor of the part retained by the grantor. Upon this point, the authorities in England, until quite recently, have been conflicting. As early as the case of *Palmer v. Fletcher*, 1 Lev. 122, the question was mooted, but there was a difference of opinion among the judges, and it was not decided. The subsequent case of *Nicholas v. Chamberlain*, 3 Cro. Jac., 121, was decided upon demurrer, and in the report of it, the pleadings are not given. It has been often cited, and sometimes for the purpose of sustaining the position that in all cases of what are termed apparent and continuous easements, the doctrine of implied reservation stands upon exactly the same footing as the doctrine of implied grant, but in so far as it may be thought to sustain that position, we have the high authority of Thesiger, L. J., who delivered the judgment of the Court of Appeal in *Wheeldon v. Burrows*, 12 Ch. Div. 31, for the statement that it has again and again been overruled. If however in addition to the doctrine of implied grant, it merely decides that there may be an implied reservation of what are termed easements of necessity, then it is quite in accord with other English authorities.

In the later case of *Tenant v. Goldwin*, 2 Ld. Raym. 1089, so great a judge as Lord Holt, in delivering the judgment of the court, refers to *Fletcher v. Palmer*, and says: "If indeed the builder of the house sells the house, with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house, and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground and kept the house without reserving the benefit of the lights, the vendee might build against the house. But in the other case where he sells the house, the vacant piece of ground is by that grant charged with the lights." Here the doctrine of implied reservation is plainly denied. In the first edition of *Gale on Easements*, the learned author sets out the doctrine of the French law, to the effect that if the proprietor of two heritages, between which there exists an apparent and continuous servitude, disposes of one of them without

any stipulation in the contract respecting the servitude, it continues to exist, actively or passively, in favor of the heritage alienated or upon it. And with this, he says, the English law appears to agree, and declares that the only opposition to this doctrine is the opinion of Lord Holt in *Tenant v. Goldwin*, which he pronounces a mere *dictum*, or at most, an opinion founded probably upon the civil law, whereas the doctrine of the English law on this subject is probably of French origin. In the case of *Pyer v. Carter*, 1 H. & N. 916, the Court of Exchequer adopted this statement of Mr. Gale, and practically denied the existence in such cases of any distinction between an implied grant and an implied reservation with reference to such easements. But this case soon gave rise to controversy. It is supposed to have been approved by the House of Lords in *Ewart v. Cochrane*, 9 Jur. 925, but that case, which was an appeal from the Court of Sessions in Scotland, only involved the question whether that was an implied grant of the easement. The plaintiffs were the owners of a tannery, and the defendant was the owner of the adjoining house and garden. Both properties at one time belonged to the same owner, and there was a drain carrying off the surplus water from the tanyard into a cesspool in the adjoining garden, where it disappeared by absorption. The tannery was sold by the common owner in 1819 to a party under whom the plaintiffs derived title, and the defendant purchased the house and garden in 1853, and then stopped up the drain. The court below decided in favor of the plaintiffs, on the ground that there was an implied grant of the easement by the conveyance of the tannery in 1819. In the House of Lords, the chancellor (Lord Campbell) said: "The ground on which I proceed is this—that this is a servitude which the grant implies. I cannot entertain the slightest doubt upon that. I mean on the grant accompanied by the enjoyment which existed at the time the grant was made." He then cites *Pyer v. Carter*, as sustaining this position of an implied grant, as the opinion of the Court of Exchequer undoubtedly does, and in *Janes v. Jenkins*, it was cited by this court for the same purpose only. In neither of these cases did any other question than that of an implied grant arise. In the subsequent case of *White v. Bass*, 7 H. & N. 722, the Court of Exchequer itself decided in direct conflict with the doctrine of implied reservation it had previously announced in *Pyer v. Carter*. That case may be stated thus: The owners in fee of a house and adjoining land in 1856 conveyed the land to the defendant, and in 1857 sold the house to the plaintiff, and it was held, all the judges concurring, that the plaintiff could maintain no action against the defendant for building on the land

so as to obstruct the light and air which formerly came to the windows of his house. Channell, B., quotes with entire approval the opinion of Lord Holt in *Tenant v. Goldwin*, and Wilde, B., says: "It is said that the owners who conveyed to the trustees the reversion in fee of the land, having at that time themselves the use of the neighboring house, is a circumstance from which it ought to be implied, that in granting fully and freely, as they did, the land, they meant to restrict the grantees in building upon it. No authority has been cited for that position. The only authority that at all approaches that view is the case of *Pinnington v. Galland*, 9 Exch. 1; but all that case decided is that the court might, as matter of law, imply a reservation of way where it was a way of necessity. To this extent the law has gone—that where the owner of a close surrounded by his land grants the close to another without any express reservation of a way, if there is no other means of getting to the close, the law will imply a way over the grantor's land as incident to the grant. That is no authority for implying in this case a restriction upon the grantees of the land that they shall not build upon it so as to obstruct the light and air of the plaintiff's house."

Next is the case of *Suffield v. Brown*, 4 De G. I. S. 185, in which Lord Chancellor Westbury, in a very vigorous opinion, assails the doctrine of implied reservation announced by Mr. Gale and adopted in *Pyer v. Carter*, and he holds, that to imply a grant or reservation of an easement as arising upon disposition of one of two adjoining tenements by the owner of both, where the easement had no legal existence anterior to the unity of possession and is not one of necessity, is a theory in part not required by, and in other part inconsistent with the principles of English law which regulates the effect and operation of grants of real property; that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, and the operation of a plain grant, not pretended to be otherwise than in conformity with the contract between the parties, ought not to be limited and cut down by the fiction of an implied reservation; and that the grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, even if there were at the time of the grant, continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor. With respect to implied reservations in such cases, he says: "This is a very serious and alarming doctrine; I believe it to be of very recent introduction; and it is in my judgment unsupported by any

reason or principle when applied to grants for valuable consideration."

* * *

Finally in the recent case of *Wheeldon v. Burrows*, L. R., 12 Ch. Div. 31, decided in June, 1879, the question again arose and was directly presented, the facts of the case being similar to those in *White v. Bass*. The case was elaborately argued before Vice-Chancellor Bacon, and in the Court of Appeal, before Lords Justices Thesiger, James and Bagallay. In an able and extended opinion, delivered by Thesiger, L. J., all the leading English decisions are reviewed, and as the result of this review two propositions are stated: First, that all these continuous or apparent easements, or in other words, all these easements which are necessary to the reasonable enjoyment of the premises granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted, will pass to the grantee under the grant. Second, that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, and to this the only exception is of ways or easements of necessity. Both these general rules are founded upon the maxim that "a grantor shall not derogate from his grant." This principle is deeply embedded in the common law, and is universally applied by the courts whenever they have occasion to construe or determine the effect of a grant. By these recent decisions the doctrine of an implied reservation in such cases of all such easements as are mentioned in the first proposition is utterly repudiated, and the case of *Pyer v. Carter* to that extent overruled as a break in the current of authority on this point.

Such is the present state of English authority upon this question, and the law in that country seems at last to be placed upon a reasonable and solid foundation. If there was a uniform current of decisions, or even if the decided weight of judicial authority in this country were to the contrary, we should not hesitate to follow it, but we do not find such to be the case. A large majority of the American decisions which we have examined are cases falling directly under the first proposition above stated, and in them we find the doctrines of Gale on Easements and *Pyer v. Carter* not unfrequently cited. Others are cases of simultaneous sales of parts of the entire property, either privately or at auction, or under decrees or judgments, and these are also brought within the first proposition. The law in such cases is clearly stated in *Swansborough v. Coventry*, 9 Bing, 305, where it is said by Tindal, C. J.: "It is well settled by the decided cases that where the same person possesses a house having the actual use and

enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. This principle is laid down by Twisden and Wyndham, JJ., in *Palmer v. Fletcher*, 1 Lev. 122, that no man shall derogate from his own grant. The same law was adhered to in the case of *Cox v. Matthews*, 1 Vent. 237, by Lord Holt in *Roswell v. Pryer*, 6 Mod. 116, and in the later case of *Crompton v. Richards*, 1 Price 27. And in the present case the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law." Others again are cases of devises under wills or of partition among parceners or tenants in common, under statutory provisions accompanied with allotment of dower to the widow. In case of a will the devisees of the several parts take at one and the same time and under one and the same instrument, and hence the law of simultaneous sales is strictly applicable. So also in cases of partition, the parties take the several parts allotted to them under the same proceeding to which their separate titles are all referable, and there is no priority of date between them. *Brakely v. Sharp*, 2 Stock. Ch. 209. Besides in such cases, as was said by this court in *Kilgour v. Ashcom*, 5 H. & J. 82, it is made the duty of the commissioners dividing the estate to take into consideration all the advantages and disadvantages attending the several parts, to value the same accordingly, and to make division and allotment upon the basis of such consideration and valuation.

In short, after a careful examination of the numerous authorities in this country to which our attention has been called, we have found but one prominent decision by a court of last resort in which the doctrine of implied reservation in a case analogous to the one before us has been sustained, where the facts were such as fairly to present the question for determination. That is the case of *Seibert v. Levan*, 8 Barr. 383, in which the opinion of the court sustaining the doctrine was delivered by Chief Justice Gibson in his usual forcible and vigorous style. Two however of the five judges dissented, and in the course of his opinion the chief justice was obliged to set aside the opposing authorities of *Burr v. Mills*, 21 Wend. 292, and *Preble v. Reed*, 17 Me. 175. Against this case may be placed the decision in *Carbrey v. Willis*, 7 Allen, 364 (where also the facts presented the question), in which it was said by the Supreme Court of Massachusetts: "But where there is a grant

of land by metes and bounds without express reservation, and with full covenants of warranty against incumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty." In a subsequent case in the same State, *Randall v. McLaughlin*, 10 Allen, 366, notice is taken of the fact that the authority of *Pyer v. Carter* had then recently been wholly denied by the chancellor of England in the opinion given in *Suffield v. Brown*, which, says the court, "contains an elaborate review of the whole doctrine, resulting in conclusions substantially like those to which we came in *Carbrey v. Willis*." * * *

Finding then no binding decision of this court and no decided preponderance of authority in this country, to prevent us from following the law as it has recently been settled by the decisions in England, and being satisfied the distinction so clearly drawn in those decisions between what has been called an implied grant, and what has been attempted to be established under the name of an implied reservation, is not only founded in reason, but has existed almost as far back as the law upon the subject can be traced, we shall apply it to the case before us. * * *

SEC. 6. INTERFERENCE WITH EASEMENT.

BAKEMAN v. TALBOT.

31 N. Y. 366; 88 Am. Dec. 275. (1865)

Action to establish a right of way, and to enjoin the continuance of certain obstructions, and compel their removal. The premises concerned, known as lot No. 179, were formerly owned by one De Groot, who died intestate in 1838. Partition was made by suit in chancery to his heirs; and of the lots in which the tract was divided by the commissioners, lot No. 12, on the extreme east, finally came into the hands of the plaintiff, and lots 9, 10, and 11, adjoining on the west, were

acquired by the defendant. The lots were bounded on the north by the farm of one Fellows, and on the west by a public highway. In the report of the commissioners, which was confirmed by the court, there was a provision that "the right of way or passage is reserved to the said heirs respectively, and to their heirs and assigns from the highway, near the west line of said lot No. 179, and immediately adjoining the north line of the farm aforesaid, and extending east along the north line of said farm to the extreme east corner of the wood-lots aforesaid, to enable them to pass to and from their respective wood-lots for the purpose of obtaining wood and timber therefrom, or for any other purpose." The lots were wood-lots, but the defendant's had been cleared and were under cultivation. The defendant had built a fence between each of the lots, each fence running to the northerly line. Two of the fences were built with stakes, with rails to slip between them like bars, and the other was of rails, and had a "slip gate" at the northerly end, so that the rails could be taken out and turned around. The plaintiff claimed that the defendant was bound to keep open a narrow road or lane across the north end of the land, or at least place swinging gates in his fences. The court, sitting without a jury, gave judgment for the defendant. The plaintiff appealed.

DENIO, C. J. No question is made but that the plaintiff is entitled to a right of way or passage across the north end of the defendant's land. The extent of that right, and the duty of the respective owners towards each other, is to be determined by the language of the reservation and the circumstances of the case. The plaintiff insists, in substance, that the defendant was bound to keep open a narrow road or lane across the north end of his land, or if he will not do this, that he should, at least, insert swinging gates in his fences, which might be opened and shut with ease whenever the plaintiff had occasion to pass. What the defendant did, as I understand the testimony and the judge's conclusions, was to subdivide his land in the manner which he found convenient for its occupation, running the fences quite to his northerly line, making arrangements, however, at the place indicated for passage, by which the bars or rails could be readily removed and conveniently replaced, when the plaintiff should have occasion to go through. This would, no doubt, be somewhat less beneficial to the plaintiff than either a clear space like a common road, or a series of gates which could be opened and shut like doors. But it would be much less onerous to the defendant, who, upon the plaintiff's position, would have to forego the use of a considerable strip of land, and in addition, to build a lateral

fence across the whole north end of the premises, or to incur considerable expense in erecting gates.

I am of opinion that the defendant's position presents the more reasonable view of the case. The main object of the reservation in the commissioner's report was to enable those of the proprietors who should become the owners of the lots most remote from the highway to go upon and pass over the land of the others, situated between them and the highway, without committing a trespass, and to define the direction of such passage. We are not to intend that it was designed to make the burden unnecessarily onerous. The circumstances that the land was wholly in forest, and that the primary purpose indicated was the carrying of wood and timber, do not suggest the necessity of a thoroughfare, like the highway, or an unimpeded private way. If the passage was made as convenient as the mode of access which a farmer usually provides for himself to get to and from his woodland, it seems to me that the purposes of the reservation would be confirmed.

De Groot formerly possessed the whole farm. It was about to be subdivided and assigned in severalty to different owners. It would be improper that those to whom back lots were assigned should be precluded from getting to the highway, except by committing a trespass, or by claiming a way by necessity,—a right but little known and not of convenient application. Moreover, the exigencies of the case did not contemplate a constant use of the passage, but only such an occasional use as the resort to wood land would require, and such as the plaintiff has since exercised. There is no reason to believe that if the plaintiff, besides owning the back wood-lot, had also been the proprietor of the intervening cleared land, he would have found it necessary, or thought it expedient, to have fenced out a lane, or have erected these gates for his use, in passing to and from his timber land, and if he would not have done so, it is unreasonable to require it of the defendant.

The defendant certainly has no right to preclude the plaintiff from availing himself of the right of passage, or to render the exercise of that right unusually or unreasonably difficult or burdensome. I think he is not shown to have done so. It must be kept in mind that the plaintiff's lot is still woodland. It may remain so for many years; but it may be cleared up and cultivated, and have buildings erected on it, and be applied to such uses as to require constant and frequent passage between it and the highway. There is nothing inconsistent in holding that the present arrangements are suitable and sufficient, under existing circumstances; and after these circumstances have changed, and the question shall arise as to what shall then be proper to determine that

a passage perpetually open, or a system of gates better adapted to such increased use than the present fences and bars, shall be required of the defendant. It would not be right, at this time, to oblige the defendant to furnish facilities for a state of affairs which may never arise, or which may not arise until some remote period. •

The doctrine that the facilities for passage, where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority: *Hemphill v. City of Boston*, 8 Cush. 195 (54 Am. Dec. 749); *Cowling v. Higginson*, 4 Mees. & W. 245. The last case determines, in effect, that the extent of privilege created by the dedication of a private right of passage depends upon the circumstances, and raises a question for the determination of a jury. If, therefore, in the present case, I felt less confidence in the conclusion I have stated than I do, I should hold the question had been settled by the judge, sitting in the place of a jury, in a manner that we could not disturb. The judgment should be affirmed. * * *

CHAPTER XIX.

PROFITS A PRENDRE.

BROWN v. SPILLMAN, *Supra*, p. 10.

HUNTINGTON v. ASHER.

96 N. Y. 604; 48 Am. Rep. 653. (1884)

FINCH, J. The contract of purchase and sale between the original parties contemplated the creation of a right to take ice from the unsold lands of the grantor as an incident to the conveyance of the half acre and an appurtenance of the land conveyed. It is impossible to study the arrangement in its details and arrive at a different conclusion. The half acre of land was purchased for the known and declared purpose of erecting thereon an ice-house to store the product of the pond and as a means of conducting the ice business. The terms of the deed substantially so declare, and the fact is not denied by the findings of the trial court. The right thus given was a natural, appropriate and necessary adjunct of the land conveyed, having in view the purpose for which it was purchased on the one hand and sold on the other. There was no sale of the right in gross for its own sole and separate consideration, but the price of the land paid and to be paid covered the land with its right attached. The arrangement was meant to be continuous and to follow the two estates irrespective of their ownership. The conveyance of the right, like that of the land, was to the grantee and his assigns, and the former was declared in terms to pass as "incident" to the grant of the latter. And then the grantee, "for himself, his heirs and assigns," covenants to furnish ice to the successive grantees of the pond and mill privilege so long as they reside in the town of Rhinebeck. The contract thus contemplated a dominant and servient estate. If a mill, dependent upon water-power, had stood upon the half acre, the right to draw from the pond would have passed with the land as an appurtenant easement, if such had been the

actual situation of the premises or the express agreement of the parties. If no mill and no raceway were there, but the purchase was for the purpose of erecting them, and the deed gave the water-right accordingly and as incident to the conveyance, such right would become an appurtenance, at least when exercised, and pass with the land. But the right in question here is of somewhat a different character, and upon that difference is founded the conclusion of the General Term and much of the argument before us.

The opinion below asserts that the right under consideration was not an easement attached to a dominant estate, and not an appurtenance of the latter. The reason assigned is in these words: "A right by which one person is entitled to remove and appropriate for his own use anything growing in, or attached to, or subsisting upon the land of another, for the purpose of the profit to be gained from the property thereby acquired in the thing removed, has always been considered in law a different species of right from an easement. Such right is a privilege, and so is an easement; but the latter is a privilege without profit, and is merely accessorial to the rights of property in land, while the former is the reverse. If granted to one in gross it is so far of the character of an estate or interest in the land itself that it is treated as such." Authority is then cited for the doctrine. Per Chancellor Walworth, *Post v. Pearsall*, 22 Wend. 425; *Godd. Easem.* 5 *et seq.*: 2 Washb. *Easem.* 11 *et seq.*, 312, 521, 528. And the learned General Term add that "an easement proper in gross cannot be created by grant so as to be assignable or inheritable." *Ackroyd v. Smith*, 10 C. B. 164.

It must be admitted that the strict and technical definition of an easement excludes a right to the products or proceeds of land, or as they are generally termed, profits *a prendre*. But that such a right is in the nature of an easement, and although capable of being transferred in gross, may also be attached to land as an appurtenance and pass as such, is shown by the authorities to which the General Term refer. In *Post v. Pearsall*, *supra*, the language of the chancellor is "for a profit *a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself." That it may be so granted by the terms of the grant as to become an appurtenant right in the nature of an easement is implied in the citation. Washburn, to whose discussion of the subject we are referred, says distinctly, "this right of profit *a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate"

(Washb. Easem. 8, 7) ; and alluding also to rights acquired by custom or dedication, the author adds: "It would be difficult to treat of easements or servitudes without embracing these rights, as well as that of taking profits in another's land which one may enjoy in connection with the occupancy of the estate to which such right is united." It seems therefore to be the law that a right to take a profit from another's land, although capable of being transferred in gross, may also be so attached to a dominant estate as to pass with it by a grant transferring the land with its appurtenances.

The case of *Ackroyd v. Smith*, 10 C. B. 164, does not controvert this doctrine, but rather limits and restricts it. There the controversy arose over a grant of way to the premises conveyed "for all purposes," and the question came up whether a conveyance of the alleged dominant estate carried this right to the purchaser, and it was ruled that it did not. The court said: "If the right conferred by the deed set out was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land, and this we think is the true construction of it, it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it." The court thereupon ruled that "it is not in the power of a vendor to create rights not connected with the use or enjoyment of the land, and annex them to it," and held that such right must "inhere in the land;" "must concern the demised premises and the mode of occupying them;" "must be *quodammodo* annexed and appurtenant to them;" "must both concern the thing demised and tend to support it, and support the reversioner's estate." That the right claimed in the present case is within the boundary assigned seems to us quite certain. It respected the use and occupation of the half acre; was necessary and essential to that use, and directly concerned the mode of occupying the land as contemplated both by the vendor and vendee. An instructive case on this point is that of *Grubb v. Guilford*, 4 Watts, 223. There, on sale of twenty acres of ore-bank, a right was also given to the grantee to enter upon other lands of the grantor and search for iron ore, and mine and carry it away. The question was whether such right was appurtenant to the twenty acres, and it was held that it was not. Among the reasons given were that a separate consideration for the ore mined was to be given, and that the right was in no manner necessary to the use or occupation of the twenty acres, and did not concern or affect it at all. The furnace to be supplied was

on other lands, and the court said that the argument tended only to show that the right was appurtenant to the furnace, and not to the twenty acres, because while it was needed for the one, it was not for the other, and in no manner concerned it.

The answer made by the respondent to this view of the case is three-fold. Her counsel argue that the right in question was a mere license, and passed no estate in the land. But a license is revocable and disappears upon a conveyance, binding in no respect the new grantee, and the vendor did not so understand the right he had given, for when he conveyed, he did so "subject to the right heretofore conveyed to J. Howard Asher, of taking ice from the pond"—a provision meaningless and unnecessary if referred to a license revocable at any moment. The grantee had no such intent or understanding, for he went on at once to construct his ice-house, and organize his business at an expense which must have been serious and considerable, and which he would not have done had he known that he held but a mere license which his grantor could at will revoke. *Wetmore v. White*, 2 Cai. Cas. 87; *Wiseman v. Licksinger*, 84 N. Y. 39, 40; s. c., 38 Am. Rep. 479. And if the deed to Asher did not pass an interest in the grantor's land covered by the pond, it passed nothing, for it did not transfer any ice. There was, none at the time to be transferred, and when it formed, Asher had no title to the whole or any specific part of it. He had simply a right to acquire such title to so much as would fill his ice-house on the half acre by going upon the premises, and cutting and taking that quantity. The case of *Doe v. Wood*, 2 B. & Ald. 724, illustrates the distinction. In that case the grant was of a right to search for metals in the grantor's land, and to raise and dispose of the same when found. It was held to be not a specific grant of the metals in the land, but a right of property only as to such part thereof, as under the liberties granted, should be dug and got, and that such right was an incorporeal privilege. And in *Grubb v. Guilford*, *supra*, it was expressly ruled that the right to raise ore was an incorporeal hereditament and not, as had been contended, a license revocable at the will of the parties.

Then it is further said that the grantor and those succeeding him were not bound to maintain the dam, and when the pond was destroyed the right was gone. It may be that they were not bound to maintain it, but that fact did not authorize them to destroy it or prevent its necessary repair. To assert that is at once to convert the easement into a mere license, revocable at any moment. The grant of the easement carried with it whatever was essential to its enjoyment, and gave to the

owner of the dominant estate the right to repair and rebuild the dam. Washb. Easem. 39, 565; *Roberts v. Roberts*, 55 N. Y. 275.

After the original conveyance to Asher the defendant became a lessee of the lot. Before that her lessor had built the ice-house and taken ice from the pond with which to fill it, and so exercised his right and made it parcel of his estate. In 1872 one of Hogan's grantees had destroyed the dam, and no ice was taken until 1877. In the fall of that year, the defendant, being lessee, applied to and obtained plaintiff's consent to build a temporary dam and cut the ice, which was done; the dam being removed in the spring of the next year. The defendant afterward became owner by a deed from Asher. Upon these facts it is argued that the defendant admitted that the right to take ice had ended in 1872. It would be quite as just an inference that the plaintiff admitted a right to replace the dam. She does not appear to have denied such right until the next year.

The whole question thus turns upon the inquiry whether the privilege granted was of such a character as to be in the nature of an easement and become, when exercised, an appurtenance. It does not concern or inhere in the land precisely like a right of way which is essential or convenient irrespective of the use to which the land is put, but does so relatively to that use, as in the case of land used for a mill or for the manufacture of iron. In those cases, as in this, the use for which the land was bought, and which characterized the contract of purchase, became the essential element by which the privilege granted was to be measured and judged. The right to take ice from the pond was the one essential thing leading to the purchase of the half acre, justifying the building put upon it, and making possible the performance of the covenants for supply. We think that right passed to the present defendant.

The judgment should be reversed and a new trial granted, costs to abide the event.

Note: The right to take water from another's land is held to be an easement involving rather the right to cross the land than the taking of the water from the land. *Goodrich v. Burbank*, 12 Allen (Mass.), 459; 90 Am. Dec. 161.

WILLIAMS v. GIBSON.

84 Ala. 228; 5 Am. St. Rep. 368; 4 So. 350. (1887)

SOMERVILLE, J. The present suit, which is one of ejectment under the statute, involves a controversy between the superjacent and subjacent owners of land, upon which there is a coal mine, opened and in process of being worked by the defendant. The plaintiff, Gibson, is the owner of the surface, and the defendant, Williams, of the "coal and other minerals," with certain incidental and other rights, derived through various *mesne* conveyances from one Green B. Frost, the original owner in fee simple of the premises. In November, 1881, Frost conveyed to one Peters "all the coal and other minerals in, under, and upon" these lands, which are fully described in the deed; "and also all timber and water upon the same necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." Subsequently, in August, 1884, Frost conveyed the same lands to one C. L. Frost and J. B. Reeves, reserving, by exception from the lands sold, the mineral rights and other interest previously conveyed to Peters, using the same language of description adopted in the deed to him. The defendant is shown to have acquired by deed, through sundry *mesne* conveyances, the precise interest which Peters owned.

This interest may be briefly described under three general heads:

1. A grant of all the coal and other minerals upon or in the land;
2. So much of the timber and water on the land as may be necessary (a) for the development, working, and mining of the coal and other minerals, and (b) for the preparation of the same for the market, and their removal from the soil and the premises;
3. The right of way, by roads of any description, to and from the lands, so far as may be necessary for the transportation of all minerals mined, and of materials and implements needed in the business of mining and the preparation of the minerals for market.

The material question is, what, if any, surface rights pass to the

grantee under the first head, which is a grant of all the coal and other minerals upon and in the land.

This is dependent in some measure upon the nature and characteristics of the thing granted. Minerals which are unsevered from the soil, or, as sometimes said, which are "in place," are parts of the freehold, and constitute landed property. They are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person, and that of the mines and minerals on it in another. It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right, or easement merely in the nature of a license: *Bainbridge on Mines and Mining*, Am. ed., 3, 261; *Massot v. Moses*, 3 S. C. 168; 16 Am. Rep. 697; *Caldwell v. Fulton*, 31 Pa. St. 475; *Melton v. Lambard*, 51 Cal. 258; *Ryeman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464.

The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also to work them, unless the language of the grant itself repels this construction. This is the result of the familiar maxim, that "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted": *Sheppard's Touchstone*, 89; 11 Coke, 52 a. This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and of the improvements in the arts and sciences, but without injury to the right of support for the surface, or superincumbent soil, in its natural state: *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; *Bainbridge on Mines and Mining*, 35, 62, 63. It is said by a standard English author touching this subject: "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power cannot be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in no wise exclude the full operation of the law": *Bainbridge on Mines and Mining*, Am. ed., 34, 35.

It is contended that this incidental right to work the mines on the

land is limited by the special grant of certain timber and water privileges, and of the right of way to and from the mines, and that the mention of these privileges, under the maxim, *Expressio unius est exclusio alterius*, would rebut the grant of any right to occupy the surface of the soil for miners' houses, or other like purposes. It is often said that great caution is frequently necessary in the application of this maxim, and of its twin legal aphorism of synonymous meaning, *Expressum, facit cessare tacitum*: Broom's Legal Maxims, 506. It is obvious that without the right of surface occupation to some extent, the grant in question is rendered nugatory. The principle is well settled that one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations: *Turner v. Reynolds*, 23 Pa. St. 199; *Rogers v. Taylor*, 38 Eng. L. & Eq. 574; *Tennessee etc. R. R. Co. v. East Alabama R. R. Co.*, 75 Ala. 524, 525; 51 Am. Rep. 475. To construe away this right would be to construe away the grant itself, which cannot be enjoyed without it. It is our opinion that the enumeration of these special privileges was not intended to exclude another which was absolutely necessary to the very life of the grant itself. The right to use timber would not pass by implication: *Bainbridge on Mines and Mining*, 64. This was, therefore, the acquisition of a new and valuable right. The right of way and water privileges were also more comprehensive possibly than would have been yielded pacifically by mere construction. At any rate, these several grants themselves necessarily imply the right to occupy so much of the surface as might be needed to open and work the mines. There could be no use of timber, or water, or right of way, except in connection with working the mines, and there could be no working of the mines without an occupation of the surface in the vicinity of the shafts, slopes, or other requisite openings. These specifications strengthen rather than repel the implication in question: *Marvin v. Brewster Iron Mining Co.*, 14 Am. Rep. 329; *Bainbridge on Mines and Mining*, 34, 35.

The owner of the minerals and mining rights must use his own so as not reasonably to injure his neighbor, the owner of the surface or soil; and it is, we repeat, now settled by the authorities quite universally, that he must conduct his mining operations so as to leave a sufficient support for the surface: *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722, and cases cited; *Harris v. Ryding*, 5 Mees. & W. 69; *Rogers on Mining*, 455. In other words, the exclusive grantee of minerals in lands is entitled to dig and carry away so much of them as he

can excavate from the soil without injury to the surface owned by the grantor, the mining right being servient to the surface to the extent of sufficient supports to sustain it in its natural state: *Jones v. Wagner*, 5 Am. Rep. 385. But he is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mines, not injurious to the surface, as, for example, the loss of springs by the owner of the soil: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; or the disturbance of the peace and comfort of the surface owner's dwelling by necessary blasting in the mines: *Marvin v. Brewster Iron Mining Co.*, 14 Id. 322.

These incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention: *Bainbridge on Mines and Mining*, 63, 64; *Marvin v. Brewster Iron Mining Co.*, 14 Am. Rep. 322. It has been accordingly held in England that a reservation of mines of coal (which is usually the same in legal effect as a grant), with rights of way for transportation, involved the right to construct a modern railway, although this mode of transportation was unknown at the time of the grant. The ground of the decision seems to have been, that without use of the railway for shipment the mines could not, under the evidence, have been worked beneficially, or with reasonable profit.

We do not construe the language of the present grant or reservation as it appears in the deeds of the plaintiff and those under whom he claims to confer any right by implication or otherwise, to use the surface of the land for the purpose of erecting coke-ovens, designed for the conversion of coal into coke. His only right is to mine and transport coal in its first marketable state. The contract clearly contemplated nothing else. Such is the usual construction placed upon similar grants, the principle being thus stated by *Bainbridge* in his treatise on mines and mining, page 63: "An owner of that kind cannot use the surface, or any of the materials of the land, for changing the character of the mineral to which he is entitled, as for converting coal into coke,

clay into bricks, or for smelting the metallic ores, much less for any further purpose of manufacture."

The evidence shows that the defendant claimed the right to occupy as much as three acres of the surface of plaintiff's land as incident to his grant. Upon this area he had erected five two-story framed miners' houses, four log cabins for the occupancy of employees, an air-shaft for conveying smoke from and ventilating the mines, a powder-house for keeping powder used for blasting, a blacksmith-shop, and a store-house for furnishing the miners with supplies. Which of these improvements are reasonably necessary for the profitable and beneficial working of the mines, is a question of fact to be determined from the evidence by the jury. And so likewise the inquiry as to how much of the surface of the land may be reasonably needed for this purpose. It may be that other suitable lands, conveniently situated, could be obtained at a reasonable price for the site of the miners' houses, the cabins, and the store; or the contrary may be true. It may be that the mine was so far distant from the market for supplies, and that prices in neighboring stores were so extravagant, as to render necessary the establishment of a supply store, both for the economy of time and money of the employees. It may be that such a store was a mere convenience, and not a necessity, within the meaning of the law, for this necessity cannot be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense: Note to *O'Rourke v. Smith*, 23 Am. Rep. 446; *Tiedeman on Real Property*, secs. 606, 609. These and other like considerations it would be proper for the jury to consider in solving the question of necessity,—a word of relative import, which may mean, on the one hand, less than imperative need, and on the other, more than mere suitable convenience.

It is manifest that the rulings of the circuit court are not in harmony with these views, including both the instructions to the jury and the rulings on the evidence.

The defendant should have been permitted to show to what extent his occupancy of the surface of the lands, around the opening of the mine, was reasonably necessary, under the above rules, to the prosecution of the mining business. * * *

Judgment reversed.

CHAPTER XX.

COVENANTS RUNNING WITH THE LAND.

SPENCER'S CASE, *Supra*, p. 125.

HICKEY v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

51 *Ohio St.* 40; 46 *Am. St. Rep* 543; 23 *L. R. A.* 396; 36 *N. E.* 72.
(1894)

Action against James Hickey for failure to maintain a fence. His liability depended upon a condition in the conveyance by which he acquired title from the plaintiff in this action. After receiving the conveyance Hickey sold and conveyed sundry parcels to divers persons. Notice was given both to Hickey and his several grantees to repair the fence, and on their failure to do so the plaintiff repaired it at its own expense. * * *

DICKMAN, J. In December, 1874, the railway company executed and delivered to James Hickey, the plaintiff in error, a deed, duly recorded thereafter, of three hundred and eighty-two acres of land, situate in Cuyahoga county, Ohio, and the grantee entered into possession of the granted premises. The deed contained the following condition and agreement: "This conveyance is made subject to the condition that the said James Hickey, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the Lake Shore & Michigan Southern Railway as now located, * * * which condition and obligation shall be perpetually binding on the owners of the land."

Subsequently to the conveyance Hickey sold to different parties sundry parcels of the same land. The fences along the line of the railway and in front of the several parcels thus sold becoming out of repair, the railway company requested each of the vendees and occupiers of the parcels of land purchased from Hickey to repair and reconstruct

the fences in accordance with the condition and agreement in the deed from the railway company. Upon the vendees and occupiers refusing and failing so to do, the company caused the fences to be repaired and rebuilt in a manner sufficient to turn stock and animals as required by law, and commenced the original action to recover the cost and expense of such repairing and rebuilding.

The question presented is, whether the cost and expense so incurred should be borne by the plaintiff in error, the first grantee, or by his respective vendees along the lines of whose lands the fences have been repaired or rebuilt.

It was resolved in Spencer's case, 5 Coke, 16, that the law would not annex the covenant to a thing which had no being at the time of the demise, as in the case of a covenant by a lessee to build a wall upon part of the land demised; and if the covenant should be entered into by the lessee for himself, his executors and administrators, without naming his assigns, the lessee, his executors or administrators would be bound, and not his assignee. But, it was also resolved, that if the lessee had covenanted, for himself and his assigns, to make a new wall upon some part of the thing demised, forasmuch as it was to be done upon the land demised, it would bind the assignee; for although the covenant extended to a thing to be newly made, yet, as it was to be made upon the thing demised, and the assignee was to take the benefit of it, it should bind the assignee by express words: Spencer's case, 5 Coke, 16, resolutions 1, 2; 1 Smith's Leading Cases, 68. In other words, the covenants which are connected with the estate run with the land, and vest in point of benefit and liability in the assignee.

Nor is this principle to be restricted in its application to leases or deeds *inter partes*, executed by both lessor and lessee, or grantor and grantee. Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and, by express words, his heirs and assigns.

In Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633, it was held that a clause in a deed poll to the effect that the grantee agrees for herself and for her heirs and assigns, that she and they would forever

make and maintain a fence all around the granted premises, was of the same effect as an express covenant, signed and sealed by the grantee; that it would run with the land; that it created an incumbrance upon the land; and, by implication, it was recognized that a subsequent grantee would be liable to the original grantor in an action of assumpsit for nonperformance of the stipulation. A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550.

And, in *Georgia Southern R. R. Co. v. Reeves*, 64 Ga. 492, the grantor, in consideration of twenty-five dollars, and of the building of the railroad, conveyed to a company, its successors, or assigns forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction of the rights, privileges, franchises, and property of the former: See, also, *Countryman v. Dick*, 13 Abb. N. Cas. 110.

If the conditions, stipulations, or covenants in a deed poll may thus run with the land, and bind the first grantee and subsequent purchasers from him, why, it is inquired, should not the plaintiff in error, as well as his grantees, be holden to perform the condition and obligation contained in the deed from the railway company? If the conveyance had been made subject only to the condition that "James Hickey, his heirs and assigns," shall make and maintain good and sufficient fences on each side of the right of way of the railway, the railway company, we think might, at its election, pursue either the original grantee or his vendee, or both, for payment. But the conveyance contains the further provision that such "condition and obligation shall be perpetually binding on the owners of the land." This provision cannot be regarded as meaningless and without design. In the construction of deeds the object of all rules is to ascertain the intent of the parties. And, in construing the words of a grant, of covenant, of qualification, condition, restraint, exception, or explanation, every word should be presumed to have been used for some purpose, and should be deemed to have some force and effect, if it can have: *Devlin on Deeds*, sec. 840; *Salisbury v. Andrews*, 19 Pick. 250, 252.

In the case before us the railway company conveyed the land in fee, and, as part consideration, imposed a condition for making and maintaining fences which was to be "Perpetually binding on the owners of the land." The meaning of the condition, we think, was to place upon Hickey an obligation to make and maintain the fences only during the time he was the owner of the land. At his death his heirs, upon succeeding to the ownership, would be held to make and maintain the fences while their ownership lasted. If he or his heirs or devisees should sell the land the assignees would likewise be held while they continued to be owners, the obligation thus running with the land. Manifestly it was not Hickey's intention to assume an obligation in *perpetuam*, and after having sold and conveyed the premises in fee, to remain bound for life, and his heirs to be bound after his death, to build and keep up the fences between the right of way and the land sold. And, in getting at the intention of the railway company, the obvious inference would be, that the company would naturally provide for a recourse to those who might own the land at the time the fences needed repairing or rebuilding, rather than to its grantee and his heirs, who might, perhaps, at the time be dead or unable to be found. We cannot but conclude that the company intended, when the land was conveyed, to trust to the land and its owners for a performance of the condition contained in the deed, and not to its grantee after he ceased to be the owner. The fact that the company imposed the condition that the grantee and "his assigns" should make and maintain the fences, and added thereto that the condition or obligation should be perpetually binding on "the owners of the land" would indicate an intention to make ownership the test as to who should be bound to perform the condition in the deed.

In *Worthington v. Hewes*, 19 Ohio St. 66, there was a demise of certain real estate to the lessee and his assigns, for ninety-nine years, renewable forever. The lease provided that the rent was to be fixed by a reappraisal of the premises every fifteen years. The stipulation in the lease as to the mode of appointing appraisers was held to be a covenant running with the land, and not a collateral covenant. For all substantial purposes the estate was treated as a leasehold estate in name and in form only. The lessor, in effect, having parted at once with his entire estate, the lessee was deemed to have taken in form a chattel, but in fact an estate in fee. The liability of the lessee for rents was regarded as simply a question of intention; and it was held that, after an unconditional assignment by the lessee, he was not liable for future rents and had no right to interfere in the appointment of appraisers,

which was a matter to be adjusted, not by the original parties to the lease, but by their assignees. The decision, though not altogether decisive, is, in a measure forcibly illustrative of principles involved in the case at bar.

The judgment of the circuit court, in our opinion, should be reversed and that of the court of common pleas affirmed.

Note: For the rule adopted by the courts of Massachusetts, see *Martin v. Drevian*, 128 Mass. 515.

POST v. WEIL.

115 N. Y. 361; 12 Am. St. Rep. 809; 5 L. R. A. 422; 22 N. E. 145.
(1889)

GRAY, J. This action arose out of the refusal of the appellant's testator to complete his agreement to purchase certain lots of land in the city of New York.

Their sale had been at public auction, and by its terms an indisputable title was offered to purchasers. Weil, the appellant's testator, refused to accept the deed which was tendered to him, on the ground that by the provisions of a former deed on record, and through which the title of the vendors was derived, the property of which these lots were part was subject to the operation of a condition subsequent, to wit, a condition that no part of the premises should ever be used or occupied as a tavern. Whether this objection was sound and available to Weil, is the question which is involved in this appeal. After a careful consideration of the facts, and upon a review of the whole situation, I am unable to find any serious difficulty in reading the clause in question as a covenant, whether we consider it on principles of strict law or of common justice. Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason. The

operation of this clause, is contended for by the appellant, would have been to effect a great injustice; whereas if, as we read it, it was intended as a covenant for the protection of property, no prejudice could accrue to anyone, and the purpose in the original grant would be respected and preserved in all its integrity. I am aware of the difficulty which attends the discussion of the legal question involved in this case, and also of the importance which is given to it by the fact that the courts below have held the clause in the deed to be a condition subsequent, while they have enforced the performance of the agreement of purchase upon other grounds. I shall therefore briefly review the facts as they appear in the record before us, in order better to demonstrate that the conclusion to be drawn from them, as to the probable intention of the parties, is, that the clause under consideration could only have been inserted as a covenant.

The premises in question were formerly part of a large estate lying in the upper portion of New York island, and known as Monte Alta. That estate and an adjoining estate, known as Claremont, were owned and occupied as farms and country residences by one Michael Hogan. In 1807 he entered into an agreement in writing with one Jacob Mark for the sale to him of the Monte Alta estate for a sum of sixteen thousand dollars, and the agreement contained this clause: "Upon the special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." In 1811, four years afterwards, Hogan and wife deeded to Robert Lenox, Jacob Stout, and John Wells, upon certain trusts, both of said estates; that of Monte Alta, however, subject to the agreement with Mark. These facts are disclosed, not by the agreement and deeds themselves, for they do not appear to have been recorded, and they were not produced, but from subsequent deeds, which were made by these grantees or trustees of Hogan and the Hogans, in conveyance of the properties to others. We are without information as to the reason for the non-completion of Hogan's agreement with Mark from the year 1807, when it was made, until the year 1811, and we know nothing concerning the nature of the trusts upon which Lenox and his associates, in the trust referred to, received and held the properties. A few months after Hogan's conveyance to Lenox and others, Monte Alta was conveyed to Mark by a deed, in which were joined, as grantors, Hogan and wife and the said trustees. That deed recited the facts of the agreement of Hogan to sell to Mark and of the conveyance by Hogan and wife to Lenox and others as trustees, subject to that agreement. It conveyed the fee of the premises free of encumbrances, and with covenants of title and

warranty, but with the following provision, contained in the *habendum* clause, viz: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind."

The Hogans' grant was of their right, title, interest, dower, and right of dower, etc., in or to the premises described; while that of Lenox and others was directly of the premises themselves. It is quite probable that the union of the Hogans, as grantors, was to perfect the record title, which the absence from the records of their deed to Lenox and others might affect, and to prevent any question from being raised as to the validity of Mark's title. In the conveyance subsequently made, in 1812, of the Claremont estate, the grantors were the same as in that of Monte Alta, and the deed was similar in form; but it did not contain the clause respecting the use of the premises, which I have quoted from the *habendum* clause in the deed of the Monte Alta property. In 1816 a release of that restrictive clause was, as matter of fact, executed, and the title was thus freed from any question which might arise by reason of its existence; but as this release had not been recorded, and was lost at the time of the sale and of the tender of the deed by the vendors, and was not discovered and recorded until about two years afterwards, and after the commencement of this suit, it cannot be considered in determining upon the right of Weil to reject the title when the deed was tendered to him. He was entitled to rest upon the state of facts, as it was proved to be, when he refused to accept the deed. In 1819, Lenox and others executed to Hogan an instrument, which, after reciting that they had settled and accounted with him touching the trust property by him conveyed to them in 1811, "as far as the same hath been sold, appropriated, collected, received, or disposed of by them," assigned and conveyed to him whatever remainder there might be of the trust property, and Hogan, by the same instrument, released them from all claims respecting the execution of the trusts. In 1821, Joel Post became the owner of both of these estates, and he and his heirs held the same from that time until the sale by the heirs in 1873.

These are all the material facts in the case. When this purchaser objected that the estate was subject to a common-law forfeiture because of the condition subsequent reserved in the deed to Mark, the vendors answered that the tripartite deed to Mark did not reserve a condition, on the grant in fee, upon which a forfeiture would inure to

the grantor, or his heirs, in case a tavern should, at any time, be kept on the lands comprising the Monte Alta estate; but a covenant which, running with the land, would, while kept alive, prove an equitable protection against any injury from its breach, in favor of any subsisting interest, entitled to insist upon a performance of the covenant.

In that construction of the clause in the Mark deed, we think the plaintiffs were right, and as that conclusion would dispose of the case, no other of the answers which they make in defense of their title need be considered.

I understand the appellant's counsel to concede that his appeal must succeed on the sole point that the reservation pointed out in the deed created a condition subsequent. And, in fact, it must be so; for if it created a covenant, the union of both of the estates in Joel Post in 1821 would have the natural and legal result of extinguishing the covenant.

Although the words of the clause in question are apt to describe a condition subsequent reserved by a grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties; for covenants and conditions may be created by the same words. In order that a covenant shall be read from the words of an instrument, they need not be precise, nor technical, nor in any particular form. In Bacon's Abridgment, Covenant, A, it is said: "The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." In Sheppard's Touchstone, 161, 162, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words." Chancellor Kent, in his Commentaries (vol. 4, 132), in speaking of whether a clause in a deed shall be taken to create a covenant or a condition, says: "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inferences and argument." The chancellor sums up the matter in this language: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon

the application of good sense and sound equity to the object and spirit of the contract in a given case." Lord Mansfield said (1 Burr. 290) that no particular technical words are requisite towards making a covenant; and Lord Eldon said (15 Ves. 264) that covenants may be for almost anything. That they have frequently been inserted in conveyances to maintain the eligible character of property adjoining the parcel conveyed, by protecting it against the erection of nuisances, or of offensive structures, or against the carrying on of an injurious or offensive trade, is a familiar fact. It seems unnecessary to cite from the opinions of judges, or of the writers upon this subject of jurisprudence; for there is a general consensus in opinion among them that the question is one always open to the determination most consistent with the reason and the sense of the thing. Reference, whether it be to the earlier or later reports, fails to aid us in deducing from them a defined principle of construction. Many, if not most, of the early cases have been those turning upon the construction of clauses in leases, and in each case, so far as the examination I have been able to give enables me to say, the court construed the clause as the circumstances and facts of that particular case seemed to demand.

I would not pretend to reconcile all the decisions which have been made upon the subject, but I readily extract the principle that technical words may be overlooked, where they do not inevitably evidence the intention of parties. I think the tendency of the law has been to assume towards this vexed question, as towards others which have come down from the days of the old common law, a more scientific attitude. So if the only reason for construing a clause is in the technical words which have been used, the court may disregard them in performing the office of interpretation. If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving forfeiture of estates. In this connection, it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential in the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor, or his heirs, to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make

certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance in connection with the circumstances of the case and the intent to be fairly presumed therefrom.

Now, the first significant feature of this case which may be referred to in determining the intention is the agreement between Hogan and Mark. That was the agreement by which the one was to sell and the other to buy Monte Alta. In it was inserted a "special condition that no part of the land or buildings thereon should ever be used or occupied as a tavern." That was the agreement or understanding of both parties as to the restriction upon the use the premises might be put to. Then we are to presume, from what took place in the conveyance afterwards by Hogan to the trustees of both the Monte Alta and Claremont estates and their subsequent accounting with him, that Hogan had become financially embarrassed, and had sought this equitable mode of settling with his creditors. But when the trustees carried out the agreement which Hogan had made with Mark, and deeded the Monte Alta property to Mark, they incorporated in their deed the restriction which had been agreed to in the contract as to the use of the property. Now, the obvious and only purpose which Hogan could have had in view when the contract was made was to protect the adjacent property, which he then owned, from being injured by the vicinity of an undesirable structure or business. I think we all will agree that the presumption here, as in every other case where a restriction is inserted in a deed against undesirable structures or trades, is, that the insertion was for the purpose of protecting rights which the grantor had in adjacent property. In this case the clause obviously was for the benefit of the Claremont estate. This view is re-enforced by the fact that when the trustees came to sell the Claremont property no such condition was inserted in that deed. When the trustees disposed of the Monte Alta property, Hogan had ceased to have any interest, in it, other than in having it bring all that could be obtained from a sale of the properties in order to free himself from his embarrassments. When the legal estate became vested in the trustees, their duty was to make the sales yield all that was possible. They had no interest to subserve by conveying the property subject to any condition subsequent. The effect, however, of a covenant in the deed to Mark, covering a restriction like that in the agreement of the parties, would be to enhance the market value of the other property by preserving to the whole an eligible character.

An intention that the restrictive clause should operate as a condition

subsequent seems hardly supposable under the circumstances. Except we take the words literally, no reason suggests itself for that construction. Hogan had no legal estate in the property at the time of the conveyance. What interest could he then have which the trustee might be supposed to subserve, or which he might be supposed to insist upon, in securing a reverter of the one Monte Alta estate to himself or his heirs? None is apparent, and I say, therefore, that the reason and the sense of the thing indicate that the clause is to be read as a covenant.

In construing a clause which imports into an instrument a restriction, or imposes an obligation not to do something, reliance should be placed upon the known or supposable aim of the grantor, or upon the sense of his act. So long as technical words are to be deemed unavailing to control interpretation, we should disregard them, and have resort to what may furnish some evidence of the underlying intention. In speaking of the sense of the act, I refer as well to the apparent object to be attained, as to the mode resorted to in order to effect it. What reason have we to justify us in attaching to these particular words so technical a meaning, and to freight them with such serious consequences, when it appears that no such interest exists in the grantors as demands a reservation of such a condition, or makes it in the slightest degree important? Where does the necessity exist for such a technical construction?

Here the grantors of the legal title had no interest in creating a reverter to themselves; for they were mere trustees. Their grantor, whatever his beneficial interest in the trust, had no apparent interest to subserve which is pointed out, or which is discoverable in planning a reverter of the estate for a breach of condition. There was no interest, which was not adequately met by the creation of a covenant or limitation in trust that the property should not be used for the one certain purpose mentioned. I think it more agreeable to reason, as it is to the conscience, and it well comports with the character and origin of this deed, if we say that the office of this clause was simply to restrain the generality of the preceding clause: *Chapin v. Harris*, 8 Allen, 594.

The words "provided always, and these presents are upon this express condition," seem to me to serve the purpose of restricting that use of the premises, which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one that words alone should not be deemed to create a condition subsequent, and to be capable of importing possible

future forfeiture of estate, except where they do introduce some new clause, the sense of which is not referable to and in qualification of some preceding clause, and evidences some part of the consideration for the grant of the property, by the imposition of an obligation upon the grantee. Looking at these words, may we say, as they stand in the deed, that they are conditional in sense, when they, in reality, serve to qualify the generality of the grant in the language which precedes them. I think we cannot, in reason.

In *Avery v. New York Cent. etc. R. R. Co.*, 106 N. Y. 142, we have a late exposition of the views of this court upon the effect to be given to language in deeds purporting to convey upon express conditions. In that case it was sought to enjoin the defendant from maintaining a fence upon a strip of land, dividing its depot premises from the plaintiff's hotel premises, and from thus blocking up a passage-way between the hotel and depot. The land upon which defendant built the fence was conveyed by deeds, which contained the following provisions: "This conveyance is upon the express condition that the said railroad company, its successors or assigns, shall, at all times, maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, so-called (being the plaintiff's premises) adjacent to the premises hereby conveyed," etc. The grantors in these deeds had acquired title under a will to the hotel property, and their testator had been the grantor of the property, used by the defendant for its depot. The defendant denied the right of plaintiff, to whom the hotel property had been leased by the devisees, to maintain the action, alleging that the language of the provision in the deeds created a condition subsequent, which could only be taken advantage of by the grantors and their heirs. The plaintiff claimed that it must be construed as a covenant. Judge Peckham, delivering the opinion of the court, said: "We incline to the construction contended for by the plaintiff. The fact that the deed uses the language 'upon condition,' when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. * * * Construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation and to view the case in the light of such surroundings." After referring to the facts, he writes: "All these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857, was for the benefit of the hotel property, and was not meant to create a condition subsequent. * * * It was intended to be an agreement or covenant between the

parties, running with the land, providing for this access or right of way, so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage: *Stanley v. Colt*, 5 Wall. 119; *Countryman v. Deck*, 13 Abb. N. C. 110. Courts frequently, in arriving at the meaning of the words in a written instrument, construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damages can be recovered: *Hilliard on Real Property*, 4th ed., 526, sec. 13; 2 *Washburn on Real Property*, 3d ed., c 14, subd. 3, pp. 3 *et seq.*"

The avenue of reasoning by which the court reached their conclusion in that case is the one which ought to lead us to our conclusion now; that the clause in question in the case at bar was intended as a restriction, created for the benefit of the adjoining property, expressed in the strongest terms, and which was enforceable as a covenant running with the land, and was not a condition subsequent, imposed for the personal benefit of the grantors and their heirs.

For the reasons stated, the judgment appealed from should be affirmed, with costs.

PEDEN v. CHICAGO R. I. & P. RY. Co., *Supra*, p. 167.

HAZLETT v. SINCLAIR.

76 *Ind.* 488; 40 *Am. Rep.* 254. (1881)

ELLIOTT, C. J. This was an action by the appellee against the appellant for the recovery of money expended in repairing a partition fence. The only error assigned is that the court erred in sustaining a demurrer to the answer of the appellant.

The material allegations of the answer are in substance these: On the 16th day of December, 1858, one Simon Lisby was the owner of the lands now owned by the appellant and appellee; that on that day he conveyed to Richard M. Hazlett the land now owned by the appellant and which adjoins that of appellee; that the deed conveying said land contained the following covenant: "And the said grantors, for themselves, their heirs, assigns, executors and administrators, do

hereby agree and covenant as a part of this conveyance, that they will forever maintain and keep up a good and sufficient fence or wall on the line between them and the said Richard M. Hazlett;" that appellant purchased of Hazlett and received from him a deed of warranty; that appellee also acquired title from the said Lisby; and that the deeds forming the appellee's chain of title all contained full covenants of warranty; that the fence named in the complaint is on the line designated in the deed of Lisby containing the foregoing covenant.

Appellant's theory is that the covenant in Lisby's deed to Richard M. Hazlett is a covenant running with the land, and imposed a burden upon the land, and that all of Lisby's grantees, near or remote, took the land charged with this burden. The appellee upon the other hand contends that the covenant was a personal one, creating a personal charge against Lisby, but imposing no burden upon the land which would follow it into the hands of his grantees.

Much reliance is placed upon the case of *Bronson v. Coffin*, 108 Mass. 175; s. c., 11 Am. Rep. 335. In that case the person from whom both of the litigants derived title had conveyed a strip of ground to a railway company, and in the deed of conveyance was written: "I, the said T. G. Coffin, hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of said railroad." This was held to be a covenant running with the land and not a mere personal covenant, the court saying: "It was therefore rightly ruled at the trial that the clause in Coffin's deed did not create a merely personal obligation, but constituted an incumbrance upon his adjoining lands." It was also held that a privity of estate was created, because such a covenant conveyed an easement in the lands of the grantor to the grantee. Cases are cited which strongly support the decision of the court. Among them are *Wheelock v. Thayer*, 16 Pick. 68; *Morse v. Aldrich*, 19 id. 449; *Savage v. Mason*, 3 Cush. 500; *Van Rensselaer v. Read*, 26 N. Y. 558; *Woodruff v. Trenton, etc., Co.*, 2 Stockton, 489; *Carr v. Lowry's Adm'x*, 27 Penn. St. 257. The case of *Savage v. Mason*, *supra*, is said to be "the strongest case in favor of the position that the clause in Coffin's deed was a covenant running with the adjoining lands." In the case last named, a covenant very like that in the case we have in hand was held to run with the land, and it was said: "The liability to perform and the right to take advantage of this covenant, both pass to the heir or assignee of the land, to

which the covenant is attached. This covenant can by no means be considered as merely personal, or collateral, and detached from the land." In the case of *Easter v. Little Miami, etc., Co.*, 14 Ohio St. 48, the covenant in the deed was expressed in this language, that he, the grantor, "his heirs and assigns, should build and keep up a fence on each side" of the right of way granted, and this, after a very able and exhaustive discussion, was held to impose a burden upon the land of the grantor, which passed with it into the hands of his grantees. The Supreme Court of Vermont in *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550, in deciding upon the effect of a covenant very similar in its terms to that before us, examined with much care the ancient authorities, and held it to be a covenant running with the land. Among the authorities there cited is the old case of *Bally v. Wells*, 3 Wils. 25, where it was said: "If lessee covenants to build a wall and assigns over his estate, the grantee of the reversion shall have covenant against the assignee, notwithstanding the covenant wants the word assigns, yet every assignee, by accepting possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants." In the case of *Boyle v. Tamlyn*, 6 B. & C. 329, Bayley, J., says: "Such a right to have fences repaired by the owner of adjoining lands is in the nature of a grant of a distinct easement, affecting the land of the grantor." In *Blain v. Taylor*, 19 Abb. Pr. 228, the covenant was very like the one upon which the present contest is waged, and it was held, that it created an interest in adjoining lands of the grantor, and ran with the land to those deriving title from him. In that case it was said: "Although a covenant is made by one for 'himself, his heirs and assigns,' yet if the thing to be done is merely collateral, and in no respect concerns the land, an assignee is not bound. * * * The covenant in the case before us however is not collateral, but relates to the land itself. The keeping of a fence * * * in repair affects the land as much as keeping a house or any other building on the premises in repair."

It is true, as appellee asserts, that there must be a privity of estate between the covenantor and covenantee. There is in this case the requisite privity of estate. The grant of the strip of land and the covenant to maintain a fence imposed an easement in favor of the grantee upon the adjacent grounds of the grantor. This is expressly adjudged in most, and impliedly held in all, of the cases cited. This easement passes, and can only pass, with the grant of the dominant estate to which it is attached. *Moore v. Crose*, 43 Ind. 30; Wash. on Eas. 87. There was therefore privity of estate between the covenantor

and the covenantee; for the covenant operated upon the lands now owned by the appellee. Counsel are mistaken in their statement that the appellant never acquired any interest in the land now owned by the appellee, for as we have seen, such an interest was acquired, although it is true that the interest was but an easement. The appellee is therefore a privy in estate owning land burdened by a covenant running with it in favor of the appellant.

The case of *Bloch v. Isham*, 28 Ind. 37, is not in point. In that case the agreement was not embodied in the deed conveying the premises, but was a separate and independent agreement. Nor was there in that case any continuing covenant, but simply a personal contract that when one of the contracting parties used a partition wall built by the other, he should pay the one-half of the original cost thereof. It was held in *Taylor v. Owen*, 2 Black 301, that a covenant granting the exclusive right to carry on a certain business upon premises demised to a lessee, and agreeing that such business should not be carried on by any person upon any other lands owned by the lessor, was a mere personal covenant. In that case it was said: "Such a right of the proprietor of real estate to carry on trade upon his premises, cannot be made the subject of a separate conveyance, so as to prevent the subsequent holder of the property, without his own agreement, from pursuing his lawful business there. This covenant between Owen and Taylor is entirely of a personal nature. It neither runs with the land of the covenantor, nor does it create any lien thereon, either legal or equitable." It is quite plain that the case from which we have quoted affords appellee no assistance.

It is claimed by appellee's counsel that he had no knowledge, either actual or constructive, of the right claimed in the land conveyed to him. It is said that he had no constructive notice, because he was bound to look only to the conveyances made by the grantor through whom he claims.

The rule undoubtedly is that a purchaser is bound to take notice only of such conveyances as have been executed by a grantor through whom he derives title. *Corbin v. Sullivan*, 47 Ind. 356; *Ware v. Egmont*, 31 Eng. L. & Eq. 89. It is also true, however, that he is chargeable with knowledge of all information supplied by the deeds, either of his immediate or remote grantors. *Wiseman v. Hutchinson*, 20 Ind. 40. The grant of the easement in the land now owned by appellee was contained in a deed of appellee's grantor, namely, that in which the covenant which gives rise to this controversy is written. In discussing the character of that covenant, it has been incidentally said

that the covenant to keep and maintain the fence conveyed an easement in the adjacent lands then owned by the grantor. In Washburn on Easements, it is said: "And it may be stated, in general terms, that an easement to maintain a fence between two parcels may be attached to one in favor of another, if there be sufficient evidence of an original agreement to that effect between the owners." At another place the same author says: "But if a grantor, in terms, when granting lands by deed, covenant for himself, his heirs and assigns, to fence the premises, it would be a covenant which runs with the estate." P. 635. The doctrine of the author is supported by many cases cited in the notes to the text, and is, in fact, in principle the same as that declared in the cases cited by us. The interest which the appellant acquired with the estate conveyed to him was an interest in the land now owned by the appellee, and notice of this interest was furnished to the latter by the deeds of the grantor through whom he claims title.

That an easement is an interest in land is well settled. *Snowden v. Wilas*, 19 Ind. 10; *Washburn on Easements*, 5.

The court erred in sustaining appellee's demurrer to the appellant's answer.

CHAPTER XXI.

RESTRICTIONS ENFORCIBLE IN EQUITY.

TRUSTEES v. LYNCH.

70 N. Y. 440; 26 Am. Rep. 615. (1877)

Action for injunction against the carrying on of business on premises on the north-east corner of Fiftieth street and Sixth avenue in the city of New York, owned by defendant Lynch, and occupied by the other defendants as his tenants. Lynch acquired his title under one Beers, between whom and the plaintiffs, owners of the adjoining lots, it had been mutually covenanted, by an agreement binding them, and their respective heirs, successors, assigns, lessees and occupants, that their said respective lots should never be used or occupied for any stable, school-house, engine-house, manufactory, or business whatsoever. The agreement was recorded, and Lynch took title expressly subject to it. The defendant Lynch erected a dwelling-house on the lot in question, and some of his tenants used and occupied a portion of it for offices for the transaction of real estate business and for receiving orders for painting, and had their business signs exposed. The opposite side of Sixth avenue is entirely occupied, between Fiftieth and Fifty-first streets, by the Broadway Railroad stables, there is a grocery store on the south-east, and a liquor store on the south-west corner of Sixth avenue and Fiftieth street, and that avenue is occupied as a business street in that vicinity. The defendants had judgment for dismissal of the complaint, and the plaintiffs appealed.

ALLEN, J. It was competent for the plaintiffs and Mr. Beers, from the latter of whom the defendants derive title, while they were the owners of adjoining tracts or parcels of land in the city of New York, by mutual covenants to regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and the advancement in value of each. The mutual and reciprocal covenants of the contracting parties constituted a good consideration for the covenants and agreements of both. All that is required, when the undertaking of one of two contracting parties gives the consideration

for the undertaking of the other, is that there should be mutuality; covenants or undertakings by each, that each should come under some obligation, or release some right to the other; but a perfect reciprocity in the undertakings, or equality in the obligations assumed or rights released, is not involved in or essential to the sufficiency of the consideration. Equality is not of the essence of mutuality. It suffices that some promise or covenant has been made, or some right given up; and the adequacy of the same, as a consideration to support the undertaking of the other party, in the absence of fraud, is for the parties to determine. A covenant is well supported in law and in equity by any consideration, however slight. In this case it is not material to inquire whether the covenant of the plaintiffs, is, as viewed from our standpoint, the perfect equivalent of that of Mr. Beers. It was accepted by the latter as a sufficient consideration for the covenant made by him, and there is no evidence before us to impeach the agreement as one not fairly and honestly made.

The agreement itself is not void, as in restraint of trade or as imposing undue restrictions upon the use of property. Covenants, conditions and reservations, imposing like restrictions upon urban property, for the benefit of adjacent lands, having respect to light, air, ornamentation, or the exclusion of occupations which would render the entire property unsuitable for the purpose to which it could be most advantageously devoted, have been sustained, and have never been regarded as impolitic. They have been enforced at law and in equity without question. The restrictions are deemed wise by the owners, who alone are interested, and they rest upon and withdraw from general and unrestricted use but a small portion of territory within the corporate limits of any city or municipality, and neither public or private interests can suffer. It is not alleged in the answer, nor was it proved upon the hearing, that there has been any change in the character of the locality, the surroundings of the premises, or the occupation of contiguous property, or the business of the vicinage, which has rendered it inexpedient to observe the covenant, or made a disregard of it indispensable to the practical and profitable use and occupation of the premises, so that it might be inequitable to compel a specific performance of the agreement. If such a defense could avail, it has not been interposed, so that the facts found by the learned trial judge, in respect of the character of the buildings, and the business carried on at this time in Sixth avenue, are immaterial and cannot affect the result.

The purpose and intent of the parties to the agreement is apparent

from its terms preceded by the recital. The agreement recites the ownership by the respective parties of adjacent premises particularly described, and these constitute the subject-matter of the mutual covenants. There was no privity of estate, or community of interest between the parties, but each could, by grant, create an easement in his own lands for the benefit of the lands owned by the other, and the purpose of the agreement was to create mutual easements, negative in their character, for the benefit of the lands of each. It was the design to impose mutual and corresponding restrictions upon the premises belonging to each, and thus to secure a uniformity in the structure and position of buildings upon the entire premises, and to reserve the lots for, and confine their use to, first-class dwellings, to the exclusion of trades and all business, and all structures which would derogate from their value for private residences. The purpose clearly disclosed was, by the restrictions mutually imposed by the owners respectively upon the use of their several properties, to make the lots more available and desirable as sites for residences, and the agreement professes to, and does in terms, impose, for the common benefit, the restrictions in perpetuity, and to bind the heirs and assigns of the respective covenantors. This should be construed as a grant by each to the other in fee of a negative easement in the lands owned by the covenantors. An easement in favor of, and for the benefit of lands owned by third persons, can be created by grant, and a covenant by the owner, upon a good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is, in effect, the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a covenant, and even a parol agreement of the grantees. *Curtiss v. Ayrault*, 47 N. Y. 73; *Tallmadge v. East River Bank*, 26 id. 105; *Gibert v. Peteler*, 38 Barb. 488, affirmed; 38 N. Y. 165. The right sought to be enforced here is an easement, or as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another. *Wash. on Easements*, 5. Easements of all kinds may be created and exist in favor of any third

person, irrespective of any privity of estate or community of interest between the parties; and, in this respect, there is no distinction between negative easements and those rights that are more generally known as easements as a way, etc.

A covenant by the owner with A. B. his heirs and assigns, that it should be lawful for them at all times afterwards to have and to use a way by and through a close, etc., was held to be an actual grant of a way and not a covenant only for the enjoyment of such right. *Holms v. Seller*, 3 Lev. 305; *Gibert v. Peteler*, *supra*; Wash. on Easements, 22, 28, and cases cited in note 1. A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor. The covenant made by Beers was valid and binding upon him, and had he retained the ownership of the premises, it would have been specially enforced by a court of equity. Upon a disturbance of the easement by him, it was capable of being enforced by the appropriate remedies at law or in equity at the suit of the owner of the dominant tenement, at the time of the violation of the covenant. The plaintiffs appear to retain the ownership of the premises to which the easement is appurtenant, and therefore this action is properly brought by them. Equity has jurisdiction to compel the observance of covenants made for the mutual benefit and protection of all the owners of lands, by those owning different parcels of the lands, and to secure to those entitled the enjoyment of easements or servitudes annexed by grant, covenant or otherwise to private estates. 2 Story's Eq. Jur. 926a, 927; *Barrow v. Richard*, 8 Paige, 351.

It is strenuously urged, in behalf of the defendants and respondents, that there was no privity of estate between the mutual covenantors and covenantees, in respect of the premises owned by them respectively, and which were the subjects of the covenants and agreements, and that the covenants did not therefore run with the lands, binding the grantees, and subjecting them to a personal liability thereon. This may be conceded for all the purposes of this action. It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements.

The covenantor, Beers, bound himself, and in equity charged the

premises with the observance of the covenant, and thus impressed this easement upon the lands then owned by him in favor of the lands then and now owned by the plaintiffs. A right, in respect of the defendants' lands, and affecting the use in behalf of the plaintiffs and their lands, existed, which, while Beers continued the owner, equity would have been enforced, and this right was a right in perpetuity, going with, and attaching to, the lands in the hands of all subsequent grantees taking title, with notice of its existence. An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities, and such right or claim, and stands, in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do. Lord Cottenham uses this language: "If an equity is attached to property by the owner, no one purchasing, with notice of that equity, can stand in a different situation from the party from whom he purchased." *Tulk v. Moxhay*, 2 Phil. Ch. 774. In the case cited, a covenant between grantor and grantee, in respect to the use of the granted premises, was enforced against subsequent grantees thereof, with notice. The rule is of universal application as stated by Lord Cottenham. *Tallmadge v. F. R. Bank*, *supra*; *Story's Eq. Jur.* 395, 397. Here each successive grantee, from Beers, the covenantor, down to and including the defendant Lynch, the present owner, not only had notice of the covenant, and all equities growing out of the same, but took their title in terms subject to it, and impliedly agreed to observe it. It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned, that it did not run with the land, so as to give an action at law. A distinguished judge answered a like objection in a similar case by saying, in substance, that, if an action at law could not be maintained, that was an additional reason for entertaining jurisdiction in equity and preventing injustice. The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, an exception to the general rule which charges lands in the hands of a purchaser with notice with all existing equities, easements, and servitudes. The rule

and its application does not depend upon the character or classification of the equities claimed, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges however created, of which he has notice. *Parker v. Nightingale*, 6 Allen 341; *Catt v. Tourle*, L. R., 4 Ch. App. 654; *Carter v. Williams*, 18 W. R. 593; before V. C. James; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Tulk v. Moxhay*, *supra*; *Whiting v. Union R. Co.*, 11 Gray, 359; *Gibbert v. Peteler*, *supra*; *Barrow v. Richard*, *supra*; *Greene v. Creighton*, 7 R. I. 1; *Bronner v. Jones*, 23 Barb. 153. The grantees from Beers became entitled to the benefits of the corresponding covenants on the part of the plaintiffs, and of the easement in their lands, and in the purchase had recompense for any diminution in the value of their own lands by reason of the restrictions upon their use. Should it appear that the plaintiffs had parted with their title, it might be questionable whether they could maintain the action. The right exists for the benefit of the owners of the lands for the time being, and it may be waived or released by them, and it would seem they would be the proper parties to bring the action. At most, the plaintiffs would be but the dry trustees of the covenant for the benefit of their grantees, and in equity and in all cases under the present system of practice, the real party in interest should bring the action. But the plaintiff's right of action, if a cause of action exists, does not appear to have been questioned, so that no question as to parties is in the case. The cases in which it has been held that an action at law will not lie, upon a covenant restricting the use of the lands against the grantee of the covenantor, when there was no privity of estate between the covenantor and covenantee, do not aid us in determining whether there may not be relief in equity for a violation of the equitable right resting upon and growing out of the covenant treated as, in substance, a grant and the consideration upon which it was made.

The author of the American note to *Spencer's case*, 1 Smith's Lead. Cas. (6th Am. ed.) 167, recognizes the distinction between the binding obligation at law of covenants not running with the lands and the equitable rights recognized and enforced in equity in such cases. He says, speaking of such a covenant: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet in order to give effect to their intention, it may be construed by

equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the right and be subject to the obligations, which the title or liability to such an easement creates."

In *Hills v. Miller*, 3 Paige, 254, and *Trustees of Watertown v. Cowen*, 4 id. 510, and *Barrow v. Richard*, 8 id. 351, there could have been no recovery at law, or actions on the covenants, but upon the deeds and instruments, in writing, under seal, it was held that easements had been granted out of the property sought to be charged, which had come by assignments to the hands of the defendants, which were intended by the parties to be appurtenant to lands owned by the plaintiffs; and the observance of the easements was enforced.

Barrow v. Richard, although differing in circumstances from the present case, was decided upon the ground that is controlling here, that the parties intended to create mutual easements for the benefit of the owners of the whole tract, and that the want of a remedy at law would sustain rather than defeat the jurisdiction of equity, and that the covenant should consequently be enforced by injunction against those who held the land to which it related. The lands of the defendants are equitably chargeable with the easement created by Beers, and the objection, that the easement is not obligatory upon the defendants as a contract, cannot avail as a defense to a suit in equity to restrain the defendants by injunction from its violation and a destruction of the easement.

There is no waiver of the covenant and consequent surrender of the easement, alleged in the answer, proved upon the trial, or found by the judge. The building was the class of buildings permitted by the easement and suitable for occupation as a private residence. It was not specially adapted to any other use, and the plaintiffs were not bound to foresee, before its completion, that it could or would be applied to any purpose prohibited by the covenant. So far as appears their objection was seasonable. The plaintiffs did not stand by and keep silence when it was their duty to speak, and the defendants have a building which they may use for purposes contemplated by the parties. It was assumed by the judge at the trial, and does not appear to have been questioned that the businesses carried on by the defendants Yates and Blaisdell were violations of the covenants and forbidden by it. If they were not, that was a proper question to be litigated upon the trial, and may be tried upon the new trial which must be had. There is nothing in the record from which we can determine, that, if per-

mitted, such businesses will not defeat the object and purpose of the agreement of the parties, and deprive the plaintiffs of the substantial benefit of the covenant. If the occupation and use of the premises by the defendants in the manner reported by the judge is in contravention of the spirit, as well as the letter of the covenant, the question of damages is wholly immaterial. Upon that question men might differ, and it might be thought that the damages, if any, were so trifling as to be inappreciable, but the parties had the right to determine for themselves in what way and for what purposes their lands should be occupied irrespective of pecuniary gain or loss, or the effect on the market value of the lots. Doubtless another trial will, upon other facts, present other questions, and there may be objections to a recovery not disclosed by the record, but upon the record before us the judgment must be reversed, and a new trial granted.

McNEIL, et al. v. GARY.

40 App. D. C. 397; 46 L. R. A. (N. S.) 1113. (1913)

MR. JUSTICE ROBE delivered the opinion of the court:

This is an appeal from a decree in the Supreme Court of the District sustaining the demurrer to appellant's bill, and dismissing the same.

The facts, as they appear from the bill, are substantially as follows: B. Francis Saul and others became the owners of a part of a tract of land known as "Maple Grove" in the District of Columbia, which they caused to be subdivided into blocks and lots and denominated the same "Saul's Addition to the city of Washington." On the 16th day of April, 1908, they caused a plan of said subdivision to be duly recorded in the office of the surveyor of the District. Appellants Hiram C. and Sarah H. McNeil are joint owners of lot numbered 47 in said subdivision, which they purchased of the grantees of the original owners of said subdivision. The appellant Adam Steinmetz is the owner of lot 41 in said subdivision, which was conveyed to him on April 10, 1909, by said original owners. These two lots are improved by comfortable dwelling houses. The appellee is the owner of lot 45 in said subdivision, which lot she purchased on October 14, 1909, from said original owners.

This subdivision is one of the most desirable in the District for residential purposes and the great majority of the lots therein have been

sold and are now used exclusively for such purposes, the houses costing from \$3,500 to more than \$20,000. Each deed from said original owners, B. Francis Saul and others, conveying a lot in said subdivision, contained the following covenants:

"And the party of the second part (the grantee) by accepting these presents and in consideration of the above grant, doth hereby covenant, promise, and agree, for herself (himself or themselves) her (his or their) heirs, executors, administrators and assigns, to and with the said parties of the first part (the grantors), their heirs and assigns, as follows:

"First. That not more than one dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes."

These covenants were to remain in force for a term of twenty years from January 1, 1906. The appellee of course had notice of these covenants, for not only were they inserted in her deed from Saul and others, but she was required, when she purchased her lot, to sign an agreement of similar import. On the front of appellee's lot is a dwelling house valued at not less than \$3,500, and there is being erected on the rear of her lot, and within 150 feet of the residence of one of the appellants, a one-story and loft frame stable about 34 feet long and 30 feet wide, containing five stalls for horses and a large space for wagons and carriages. This structure, when completed, is to be used in a drayage or express business and plumbing business now conducted by appellee or her husband. The bill avers that the operation of this stable, as well as its proposed use, will constitute a violation of said covenants and agreement, and will be in violation of the general plan or scheme of improvement in said subdivision. It is also averred that the proposed use of said stable will constitute a nuisance.

In the view we take of the case, the averment that the proposed use of said stable will constitute a nuisance may be treated as surplusage. Since all deeds from Saul and others to lots in this subdivision contained the same restrictive covenants, it is apparent, we think, that those covenants were intended to enure, and did in fact enure, to the benefit of the several purchasers of said lots and subsequent owners thereof. As suggested in the bill, these restrictions were designed to carry out the general scheme of improvement of this subdivision. Each purchaser bought his lot with notice of this scheme and, of

course, with knowledge that every other purchaser would be influenced by it. In other words, the common understanding evidenced by the restrictive covenants induced each purchase. Under such circumstances, it is plain that one owner has a standing in equity to compel another to comply with the terms of his grant. "Equity enforces contracts and covenants in regard to property entered into between prior grantors and grantees, in regard to the use of property, especially if common property or property descending from a common source, against subsequent owners affected with actual or constructive notice of such contracts and covenants." *Trudeau v. Field*, 69 Vt. 446, 450; *Allen v. Barrett*, 99 N. E. Rep., 575; *Hano v. Bigelow*, 155 Mass. 341.

Coming to the merits, we proceed to determine whether the erection of this stable is prohibited by the restrictive covenants affecting this subdivision. It must be remembered that this is a proceeding in equity, where forms give way to substance and where intent, gleaned from the language of the instrument and the circumstances surrounding the transaction, must govern. While doubts must be resolved in favor of natural rights and the free use of property, they must be founded on reason. Thus in *Clement's Admrs. v. Putnam*, 68 Vt. 285, A owned a lot the surface of which was some eight feet below the sidewalk and conveyed the southerly end of this lot to B. covenanting never to erect any "structure or building" on the part of the lot not conveyed, within four feet of the portion conveyed. B erected a building on his lot and subsequently A conveyed the balance of the lot to C, subject to the condition in B's deed. C thereupon erected a building within four feet of B's line and was proposing to fill up the space between the two buildings with earth to the level of the sidewalk. This was held not permissible. The court said: "The fair construction of the deed is, that from the lowest level to which it applies, the space shall be kept vacant, and not that it shall be filled in a certain manner; and hence an earth filling may well be deemed a structure within the meaning of the deed. Any other construction would frustrate the manifest intention of the parties to the instrument." In *Brigham v. Mulock Co.*, 79 N. J. Eq. 287, it was held that the erection of a double house under one roof constituted a violation of a covenant forbidding more than one building to be erected on one lot for dwelling purposes. See also: *St. Andrews Lutheran Church's Appeal*, 67 Pa. St. 512; *Parker v. Nightingale*, 6 Allen (Mass.), 341; *Kraft v. Welch*, 112 Iowa, 695; *Rowland v. Miller*, 139 N. Y. 93; 11 Cyc., 1077, 1078.

It is admitted that the subdivision here involved is very desirable for residence purposes, and that all the lots that have been sold are now

used exclusively for such purposes. Having these circumstances in mind, what is the reasonable construction to be placed upon the restrictive covenants before us? Each grantee of said original holders covenanted, first, that not more than one dwelling house would be erected on his lot, and that no apartment house or flat of any description would be erected; and, second, that such building should not cost less than \$3,500, and should not be used for manufacturing, mechanical, or business purposes of any kind, but solely for dwelling purposes. It is not disputed that had the appellee erected a bungalow on the back of her lot and then attempted to devote that structure to any business purpose or, specifically, to the purpose to which she now proposes to devote the structure she is now erecting, she would be subject to the restraining hand of the court; in other words, that her act would be in violation of said covenants. This of course inevitably follows from the language of the covenants and, we think, as clearly demonstrates the weakness of appellee's position. Those who purchased lots in this subdivision were not so much concerned about the possibility that some dwelling house might be devoted to a business purpose, as they were that the subdivision should be exclusively devoted to dwelling purposes. To assume that such purchasers for a moment supposed that these covenants might be construed to mean that stores, moving picture shows, garages, and structures of like character might be erected on those lots, if erected as such, is entirely to disregard the scheme under which this subdivision was to be developed, and is to convict the purchasers of those lots of a lack of intelligence. In the first place, the provision that not more than one dwelling house shall be erected on a lot was intended to exclude the erection of other structures. This is made manifest by the second clause of the first covenant that no apartment nor flat shall be erected. The parties evidently feared that an apartment house or flat might be regarded as a dwelling house within the meaning of the preceding clause, and hence expressly excepted it from said class. The first restriction in the second covenant that no such building—that is, no such dwelling house—shall cost less than \$3,500, emphasizes what was apparently in the minds of the parties, that this subdivision should be devoted to a good class of dwellings. The next clause prevents, in terms, the use of any dwelling house for manufacturing, mechanical, or business purposes of any kind. It seems to us that no one purchasing one of these lots and accepting a deed containing these covenants could reasonably fail to understand that he could not do in one way what he was forbidden to do in another; in other words, that the provision that no more than

one dwelling house should be erected on a lot, coupled with the provisions that it should cost not less than \$3,500, and not be used for any other purposes, meant that this subdivision should be devoted to dwelling and not business purposes. The result, and not the manner of achieving it, is material. Unless these covenants are to be given this construction, they become a mere jumble of words and their obvious intent is frustrated. We conclude, therefore, that the court erred in sustaining the demurrer.

The decree will be reversed, with costs, and the cause remanded for further proceedings.

CHAPTER XXII.

RENTS.

- Section 1. Nature of Rent.
- Section 2. Transfer of Rights and Liabilities.
- Section 3. Covenants to Pay Rent in Fee.
- Section 4. Eviction.
- Section 5. Parol Surrender of Lease.

SEC. 1. NATURE OF RENT.

ORDWAY v. REMINGTON.

12 R. I. 319; 34 Am. Rep. 646. (1879)

DURFEE, C. J. The question in these cases arises on the following facts, to wit: One Bainbridge A. Whitcomb was served as garnishee in both cases, being served in the first-mentioned, December 1, 1877, at 3:15 P. M., and in the second, December 3, 1877. The garnishee had no personal estate belonging to the defendants or either of them in his hands when served, unless he was then indebted to the defendant Remington in the sum of \$337.50 for a quarter's rent. The examination of the garnishee shows that he first became the tenant of Remington under a written lease dated August 18, 1874. The lease demises the tenement let "from the first day of September now next ensuing, for and during the full end and term of one year and nine months thence next ensuing." It reserves a yearly rent of \$1,350 "by equal quarter-yearly payments during the said term, the first payment thereof to be made on the first day of December now next ensuing," etc. The tenant held over after his term expired, and continued to occupy the premises until May 31, 1878, without any new agreement. Of course it will be presumed that except in regard to time he held over on the terms of the original demise.

The question is, whether the rent which was payable December 1, 1877, was attachable at 3:15 of the afternoon of that day? This question depends on another, to wit, whether the quarter expired on that

or the previous day? For if the quarter expired on that day, then the rent, though payable, was not due until after midnight, and until due, the lessor being owner in fee of the premises demised, it was not personal estate, but the lessor dying it would have gone as realty to his heirs. *Glun's case*, 10 Rep. 127; *Rockingham v. Penrice*, 1 P. Wms. 177; *Norris v. Harrison*, 2 Madd. 268; *Duppa v. Mayo*, 1 Wms. Saund. 282, 286, and note 12; note to *Ex parte Smyth*, 1 Swanst. 342; *Taylor on Land. & Ten.* 391; 3 Greenl., Cruise, 283-5.

Whether the quarter expired December 1st or November 30th depends on the construction of the lease. The lease, as we have seen, ran "from the first day of September." If the first day of September is included, the quarter expired November 30; if it is excluded, the quarter expired December 1. The day is to be included or excluded according to the apparent intention of the parties to the lease; but if the demise is from a given day and there is nothing else to indicate the intention, then, unless there is some particular reason for holding otherwise, according to the weight of authority we think the given day must be excluded. *Taylor on Land. & Ten.*, 78; 4 Greenl. Cruise, *59, and note; *Atkins v. Sleeper*, 7 Allen, 487; *Farwell v. Rogers*, 4 Cush. 460; *Bemis v. Leonard*, 118 Mass. 502; s. c., 19 Am. Rep. 470; *Bigelow v. Willson*, 1 Pick. 485; *Styles v. Wardle*, 4 B. & C. 908; *Clayton's case*, 5 Rep. 1; *Webb v. Fairmanner*, 3 M. & W. 473; *Millard v. Willard*, 3 R. I. 42; *Handley v. Cunningham's Trustee*, 12 Bush, 401; *Sheets v. Seldon's Lessee*, 2 Wall. 177, 190; *Weeks v. Hull*, 19 Conn. 376; *Blake v. Crowninshield*, 9 N. H. 304.

The case of *Ackland v. Lutley*, 8 A. & E. 879, is precisely in point. There a house was demised *habendum* for twenty-one years from March 25, 1809, paying rent on certain days of which March 25 was one, and it was held that the term under the lease did not expire till the end of March 25, 1830. Lord Denman, in delivering judgment, said: "The general understanding is that terms for years last during the whole anniversary of the day from which they are granted. Indeed, if this were otherwise, the last day, on which rent is almost uniformly made payable, would be posterior to the lease."

The affidavit made by the tenant as garnishee indicates that he supposed the quarter ended on the last day of November. Why he supposed so does not appear. We do not think we can rightly let his opinion influence our decision.

Our decision is that the garnishee did not have any of the personal estate of the defendants or of either of them in his hands until after the first day of December, 1877, and consequently that he is only

liable as garnishee in the case of *Markland v. Remington*. In coming to this conclusion we assume that the lessor was the owner in fee of the premises demised. If he was merely a leaseholder we should have to consider the case in another light.

SEC. 2. TRANSFER OF RIGHTS AND LIABILITIES.

BEAL v. BOSTON SPRING CAR CO.

125 Mass. 157; 28 Am. Rep. 216. (1878)

ENDICOTT, J. The plaintiff, being the owner of the estate, leased the same for the term of ten years to Heyer Brothers, and they, on the same day, leased a part of the premises to the defendant for a term of five years. It is to be inferred from the subsequent agreement between the plaintiff and Heyer Brothers that other underleases were made. Before the expiration of the underlease to the defendant, Heyer Brothers assigned it to the plaintiff; who at the same time indorsed on the original lease to Heyer Brothers an agreement releasing them from rent and accepting the surrender of their lease and the premises, "but without prejudice to the leases of parts of the premises assigned to him." This agreement was made in consideration of the assignment to the plaintiff of the underleases by Heyer Brothers.

The intention of the parties is plain. Heyer Brothers having made underleases of parts of the premises which the plaintiff was willing to take, and desiring also to surrender the reversion in these leases to the plaintiff, which he was willing to accept, the underleases were assigned, including the defendant's, and the surrender of the original lease was accepted without prejudice to the underleases. They evidently did not intend that the rights of the plaintiff under the assignment, or the estates of the sub-lessees, should be destroyed by the surrender, for the language of the acceptance carefully provides for both. The purpose was to put the plaintiff precisely in the position of Heyer Brothers. This intention, as expressed in the papers they have executed, will be carried out, if consistent with the rules of law, and we are of opinion that it is.

The plaintiff brings this action, as assignee of the lease, to recover upon the defendant's covenant to pay rent; and it is well settled that when a lease is assigned without the reversion, the privity of contract

is transferred, and the assignee may sue in his own name for the rent accruing after the assignment. *Kendall v. Carland*, 5 Cush. 74; *Hunt v. Thompson*, 2 Allen, 341. The only objection suggested to the plaintiff's right to recover is the surrender of the lease of Heyer Brothers to the plaintiff; and the claim is, that the rent due from the defendant is an incident of the reversion in Heyer Brothers, and the reversion having been extinguished by the surrender, all remedies incident to it are taken away. But rent is not necessarily an incident to the reversion, so that it cannot, by the acts or agreements of the parties, be separated from it. In a general grant of the reversion, the rent will pass as incident to it. *Burden v. Thayer*, 3 Metc. 76. But the reversion may be granted and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed in the words they use. Lord Coke says that fealty is an incident inseparably annexed to the reversion, and the donor or lessor cannot grant the reversion and save to himself the fealty; but the rent he may except, because the rent, though it be an incident, yet is not inseparably incident. Co. Lit. 143a, 151b; 3 Cruise's Dig. 337; *Demarest v. Willard*, 8 Cow. 206. Heyer Brothers therefore could have granted their reversion, or surrendered it to the plaintiff and reserved the rent accruing upon the underleases. In such a case, their relations to the sub-leases would not be changed by the grant or surrender of the reversion, and they could have recovered rent of this defendant upon the covenants of its lease. Having that estate reserved in the premises, they could have assigned it to a third party or to the plaintiff, and the assignment would have been good, and the defendant would have been bound to pay to the assignee rent for the estate held under its lease. This form of proceeding was not adopted by the parties, but the same result was accomplished. As the assignments were simultaneous with the surrender, Heyer Brothers did not in terms reserve the rent to themselves, but the plaintiff accepted the surrender in consideration of the assignment, with the express stipulation that it should not prejudice the underleases assigned to him; that is, should not invalidate the assignment, or affect the rights of the parties holding the leases. * * *

SPENCER'S CASE, 5 Coke 16, *Supra*, p. 125.

GROMMES v. ST. PAUL TRUST CO.

147 Ill. 634; 37 Am. St. Rep. 248; 35 N. E. 820. (1893)

Action by one Sibley against J. B. Grommes and M. Ullrich, upon their contract of guaranty that one H. C. Donnelly would pay the rents and perform the covenants contained in a certain lease executed by Sibley to Donnelly of a certain building. Sibley died during the progress of the suit, and upon suggestion of his death the case proceeded in the name of his executors, the St. Paul Trust Company, and others. The plaintiffs obtained judgment, and the defendants appealed.

MAGRUDER, J. The main question, arising out of the assignment of errors as to the giving and refusal of instructions, has reference to the right of the lessor, or his executors, to recover for the rent which accrued after the lessor's re-entry into the possession of the demised premises. The lease provides that, if the lessee shall fail to make any of the payments of rent, or to fulfill any of the covenants of the lease, it shall be lawful for the lessor to re-enter and take and hold possession "without such re-entry working a forfeiture of the rents to be paid * * * by the party of the second part * * * during the full term of this lease." It is contended by appellants, that a re-entry by the landlord for the default of the tenant puts an end to the lease, and that no accruing or subsequent rent can be recovered after the determination of the lease. The general rule is that eviction by the lessor suspends the rent. "Acts by the landlord, in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." Such acts relieve the tenant from the payment of rent accruing after his possession ceases; but rent already accrued and overdue is not forfeited by the eviction. The rule, that eviction suspends the payment of rent, results from the meaning of the term rent, and from the obligations of the relation between landlord and tenant. Rent is compensation for the use of land, and what the tenant pays rent for is quiet possession, or beneficial enjoyment. When, therefore, the use of possession ceases, the consideration for the payment ceases: 1 Taylor's Landlord and Tenant, 8th ed., secs. 377, 378; 2 Wood's Landlord and Tenant, 2d ed., sec. 477, page 1096,

note 3; 12 Am. & Eng. Ency. of Law, p. 743; *Morris v. Tillson*, 81 Ill. 607; *Hall v. Gould*, 13 N. Y. 127; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370.

But in the cases where the rule has been laid down and enforced, it does not appear that there was an express covenant or agreement on the part of the tenant, that he would be liable for the rents accruing up to the end of the term, notwithstanding the re-entry of the landlord before the expiration of the term for default in the payment of rent. Such cases are distinguishable from the case at bar in that, here, the lease, which is signed by the tenant, and under the terms of which he entered into possession of the demised premises, provided that the re-entry by the landlord shall not work a forfeiture of the rents to be paid after such re-entry.

In some of the cases referred to the lease contains a stipulation that for any breach of covenant the lease shall "determine and be utterly void"; that is to say, void at the election of the lessor. Where there is such a stipulation in the lease entry by the landlord will be regarded as an exercise of his option to determine the lease: *Jones v. Carter*, 15 Mees. & W. 718; 1 Wood's Landlord and Tenant, 2d. ed., sec. 226, pp. 479, 480. Where the landlord elects to determine the term he cannot have a recovery for subsequent rent: *Supra*. But there is no provision in the present lease that it shall determine and be void for failure to pay rent, or for a breach of any of the other covenants. On the contrary, the lease provides, in substance, that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force. No other meaning can be given to the words, "without such re-entry working a forfeiture of the rents to be paid * * * during the full term." There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and if the parties choose to make such an agreement we see no reason why it should not be held to be valid as against both the tenant and his sureties. The guarantors in this case agreed that the tenant should pay all rents to be by him paid "according to the terms and conditions of said lease for and during the entire term thereof."

It may not be strictly accurate or correct to call the money to be paid after re-entry rent, or to treat the lease as in force after a re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but

little practical difference whether the sum agreed to be paid be called rent or damages. It may be regarded as damages for the purposes of this suit: *Hall v. Gould*, 13 N. Y. 127; *Underhill v. Collins*, 132 N. Y. 269.

In *Hall v. Gould*, 13 N. Y. 127, the lessor reserved the power in the lease to enter upon the premises for a breach of covenant, and "to re-let the same for the benefit of the lessee." During the term the lessor sued in ejectment and recovered possession, and thereafter endeavored to re-let the premises for the remainder of the term, but failed to do so. It was there held that, although by the entry for condition broken the estate of the lessee was at an end, and rent as such could no longer accrue to the lessor from the lessee, yet the provision that the lessor, in case of re-entry, was to re-let the premises for the benefit of the lessee, indicated it to be the intention of the parties that the lessee should remain answerable for any loss of rent to the lessor; that there was nothing unreasonable in the agreement of a lessee to completely indemnify his lessor for any injury which might arise to him by the lessee's breach of his own agreement, and that the lessor could recover the sum to which he was entitled under the terms of the lease as indemnity for such injury, even though that sum was called rent, when in point of law it was not, strictly speaking, rent. If the liability of the lessee for rent accruing after re-entry by the lessor may be inferred from a provision authorizing the lessor to re-let for the benefit of the lessee, then there can be no doubt about the liability of the lessee for such subsequent rent under his express stipulation that the re-entry shall not work a forfeiture thereof.

We do not think that the provision in the lease against a forfeiture of the rents to be paid during the full term can be construed as authorizing the lessor to collect the subsequent rent both from the lessee named in the lease, and also from the tenant, to whom the lessor may re-let the premises. The provision does not contemplate the collection of double rent; but the rent due from the original lessee is to be credited with such rent as is realized from the re-letting. The lessor is entitled to such sum as shall be equal to the rents required by the terms of the lease to be paid during the full term, and not to any greater sum. In harmony with this view, the fourth instruction given for the plaintiff instructed the jury "to deduct from the amount of rents remaining unpaid, if any, under said lease for the remainder of said term such rents, if any, as they may find from the evidence the said Henry H. Sibley received from said premises during the remainder of said term," etc.: *Underhill v. Collins*, 132 N. Y. 269; *Heims Brewing Co. v. Flannery*, 137 Ill. 309. * * *

SEC. 3. COVENANTS TO PAY RENT IN FEE.

SCOTT v. LUNT'S ADMINISTRATOR.

7 Pet. 596; 8 L. Ed. 584. (1833)

MR. JUSTICE STORY delivered the opinion of the court.

This cause comes before us upon a writ of error to the circuit court for the district of Columbia, sitting in Alexandria.

The original suit is an action of covenant brought by Scott, as assignee, to recover the amount of certain rents alleged to be due and in arrear from the defendant, since the death of his intestate, under an indenture stated in the pleadings. The defendant pleaded in the first place, that he had not broken the covenants in the deed; upon which plea issue was joined. Afterwards, a general demurrer was put in to the declaration; which being joined by the plaintiff, was, upon the hearing, overruled by the court. Afterwards the plea of *plene administravit* was put in, which was withdrawn; and the cause was finally tried upon another plea, which, after oyer of the indenture, stated, that "before the days in the declaration specified for the payment of the rent to the plaintiff under the said deed, that is to say, on, &c. the plaintiff, under and by virtue of the condition of re-entry in the deed contained, did enter into the premises thereby demised, for non-payment of certain rent then in arrear and unpaid, and held and occupied the same as vested in him by the said entry as his absolute estate;" upon which plea issue being joined, the jury found a verdict for the defendant. A bill of exceptions was taken at the trial, which will presently come under consideration, as matter assigned for error.

The indenture referred to was made on the 8th of August, 1799, between General George Washington and Martha, his wife, of the one part, and Ezra Lunt, the defendant's intestate, of the other part. It purports, on the part of General Washington, to grant to Lunt, his heirs and assigns forever, a parcel of land in Alexandria; he, Lunt, his heirs and assigns yielding and paying for the same, on the 8th day of August yearly, unto General Washington, his heirs and assigns, the sum of seventy-three dollars. And Lunt, and his heirs and assigns, covenant with General Washington, his heirs and assigns, that he, his heirs and assigns will yearly, and every year forever, well and truly pay the aforesaid sum of seventy-three dollars to General Washington, his heirs and assigns on the day, and at the time appointed for payment; and that it shall be lawful for General Washington, his heirs and as-

signs, at all times after the rent shall become due, to enter upon the premises, and distress and sale make of the goods and chattels found thereon, to satisfy the rent in arrears. And Lunt, his heirs and assigns, further covenant, with General Washington, his heirs and assigns, that if the yearly rent or any part thereof, be behind or unpaid for the space of thirty days after the same becomes due and payable, and sufficient goods and chattels of Lunt, his heirs and assigns, shall not be found upon the premises to pay and satisfy the same, it shall be lawful for General Washington, his heirs and assigns, to re-enter and hold the same again, as if the indenture had never been made. And then follows a covenant of general warranty on the part of General Washington, his heirs and assigns.

The executors of General Washington, by virtue of powers given by his will, on the 25th of August, 1804, by indenture, after reciting the substance of the indenture, assigned and granted unto Henry S. Turner, his heirs and assigns, the said rent by the following descriptive terms: "the aforesaid annual rent of seventy-three dollars issuing out of, and charged on the aforesaid piece or parcel of ground hereinbefore described." There are no words in this indenture assigning over the rights, powers, and remedies given by the former indenture, by distress and re-entry, or the residuary interest in the premises resulting from such re-entry. Turner, by another indenture, on the 25th of February, 1808, assigned and granted the same rent unto the plaintiff (Scott), his heirs and assigns, with the powers of distress and re-entry, and all the covenants and stipulations in the original indenture. But it is manifest, that he could not convey them, unless he had already taken them under the assignment made to him by the executors. The declaration too is founded solely upon the assignment and transfer of the rent, and contains no allegation of any assignment of the collateral rights and remedies and interests in the estate.

Under these circumstances, it is contended, that whatever might be the fate of the bill of exceptions, if the action were otherwise unobjectionable, the plaintiff, upon his own showing has no title to recover: first, because the rent is a mere chose in action, which cannot be transferred by itself to the assignee, so as to entitle him to sue therefor in his own name: and secondly, because no suit is maintainable against the defendant, as administrator, for the rent in arrear since Lunt's decease, as there is neither privity of estate, nor of contract, between him and the plaintiff. It is added, that Lunt, in fact, in his lifetime, assigned over his estate in the premises, and that his administrator is not responsible for any rent subsequently accruing and in arrear. But

this fact nowhere appears upon the pleadings: and if it did, it would not help the defendant, for it is firmly established that upon a covenant of this sort, the personal representatives of the covenantor are liable for the non-payment of the rent after assignment, although there may also be a good remedy against the assignee (Citations). The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law in England, at the emigration of our ancestors.

Whether the plaintiff as assignee of the rent, not being assignee also of the estate, in the premises, or of the rights of re-entry, can maintain the present suit, is quite a different question. If he had been the assignee of the estate, or of the right of re-entry, as well as of the rent, he would clearly be entitled to maintain it; for the laws of Virginia are in this respect co-extensive with those of England. The common law of England, and all the statutes of parliament, made in aid of the common law, prior to the fourth year of the reign of King James the First, which are of a general nature and not local to the kingdom, were expressly adopted by the Virginia statute of 1776; and the subsequent revisions of its code have confirmed the general doctrine on this particular subject. The very point was decided in *Haverhill v. Hare*, Cro. Jac. 510. There A. being seised of an estate, in fee, by indenture granted to B. his heirs and assigns, a fee farm rent with a clause of distress, and covenanted to levy a fine to uses, for securing the payment of the rent, so that, if the rent should be in arrear, B. his heirs and assigns might enter into the land, and enjoy the rents thereof, until the rent in arrear should be paid to them; and B. assigned, by a bargain and sale to C. the rent, "with all the penalties, forfeitures, profits, and advantages, comprised in the indenture." The fine was levied, the rent was in arrear, and C. entered, and brought *ejectione firmæ*; and a special verdict having been found, stating the above facts, one question was, whether this contingent and future use to arise upon non-payment of the rent, was transferable over to C., by the bargain and sale. It was strongly urged by the defendant's counsel, that it is a matter in privity and possibility only, which is not transferable before it falls *in esse*. But all the justice resolved, that it being a matter of inheritance, and being for the security for the payment for the rent, and waiting upon the rents, might well be transferred with the rent; and by the grant of the rent the penalty and advantage well passed. But if it had been a mere possibility, not coupled with any other estate, then it had not passed. This case is full to the purpose, that such a right or security is capable of being transferred, with the

rent, by apt words; and when so transferred, gives the assignee a legal title both to the rent and the attendant remedies. It leaves, however, the point untouched, whether the mere transfer of the rent, without any transfer of the right of entry (as in the present case), would give the assignee a right to maintain an action for the rent, seeing it is not knit by any privity of right or estate to the premises. Upon full consideration, however, we are of opinion, that the assignee of a fee farm rent, being an estate of inheritance, is upon the principles of the common law entitled to sue therefor in his own name. It is an exception from the general rule, that choses in action cannot be transferred; and stands upon the ground of being, not a mere personal debt, but a perdurable inheritance. Thus, if an annuity is granted to one in fee, although it be a mere personal charge, yet a writ of annuity lies therefor by the common law, not only in favour of the party and his heirs, but of their grantee. So the doctrine is expressly laid down by Lord Coke, Co. Litt. 144, b., and he is fully borne out by authority. And in like manner for a rent granted in fee and charged on land, a writ of annuity also lies in favour of the assignee, at his election.

And since the statute of 32 Henry 8, ch. 34, covenants of this sort, running with the estate or inheritance, are transferable to the assignee, with a full right to the benefit thereof. So that there is no difficulty upon principles of the common law in giving effect to the present action. Whether the present plaintiff has any right to re-entry is a very different question, upon which, in the present posture of this case, it is unnecessary to give any opinion. It is clear, by the common law, that a right of re-entry always supposes an estate in the party, and cannot be reserved to a mere stranger. So the law was laid down by the twelve judges, in *Smith v. Packard*, 3 Atk. 135, 140; and Lord Chief Justice Willes, on that occasion, in delivering their opinion, said: "Therefore I have always thought that if an estate is granted to a man reserving rent, and in default of payment, a right of entry was granted to a stranger, it was void." What effect the statute of 32 Henry 8, ch. 34, or the provisions of the revised code of Virginia, may have upon this point is a question not now before us. * * *

SEC. 4. EVICTION.

MOORE v. MANSFIELD.

182 Mass. 302; 94 Am. St. Rep. 657; 65 N. E. 398. (1902)

HOLMES, C. J. This is a bill to reach and apply the proceeds of a judgment recovered by the defendant Mansfield to the payment of a debt alleged to be due to the plaintiff for use and occupation. The bill was dismissed by the chief justice of the superior court, and the facts found by him were reported under the statute, substantially as follows: The defendant hired of the plaintiff an entire house by a parol lease, and took possession. At the time, the attic was locked and contained goods belonging to the plaintiff. The defendant did not find this out at first, but when he did he asked for the key and the use of the attic, but never got it while he occupied the house. The judge found that there was a partial eviction and dismissed the bill, seemingly on this ground, and the further one that the equitable process given by the Revised Laws, chapter 159, section 3, clause 7, to reach and apply certain property "in payment of a debt," would not be available upon a claim for an unascertained amount for use and occupation. The question is whether the facts found show the decree to have been wrong.

We say nothing about the latter ground, inasmuch as we are of opinion that the former is good in substance, so far as appears from any facts stated in the report. The plaintiff contends that there was no eviction because the defendant never had possession of the room: *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Vanderpool v. Smith*, 1 Daly, 311. If the question were material, it would raise the difficulty that while the defendant had possession of the whole land and of the room on the outside considered as an inclosed cube, yet if the analogy of the cases on larceny by carriers breaking bulk were followed, he would not have possession of the contents of the room; and, by the same argument, perhaps not of the inside of the room itself: *Y. B. 13 Edward IV*, 9, pl. 5; *Fairfax, J.*, in *Keilw.*, 160. pl. 2; *8 Edward II*, 275; *Fitz. Abr.*, *Detinue*, pl. 59; *2 Bishop's Criminal Law* 8th ed., secs. 834, 860. The true reason appears from the old books. Perhaps possession by the tenant would be presumed until the landlord's refusal gave an expressly adverse character to the landlord's

conduct, on the ground that the tenant lawfully might have unlocked the door. But it does not matter whether the refusal to give up the room was a failure to perform the whole contract from the beginning, or a partial eviction after performance at the outset. The difference would be material only if there were a question of waiver involved. But there is no such question in the case. The tenant entered not knowing that the room was locked, and no fact later than the entry is recited which implied a waiver. All that appears is that the failure to open the room continued during the tenancy, and that the tenant insisted upon his rights. There being no waiver, the plaintiff could not recover on the express contract because he had not furnished the stipulated consideration, and he could not recover upon an implied one for the benefit actually received because the failure to furnish the whole was due to his own willful fault: *Leishman v. White*, 1 Allen, 489; *Royce v. Guggenheim*, 106 Mass. 201, 202, 8 Am. Rep. 322; *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781. It may be that in this class of cases the old common law is adhered to a little more rigidly than in some others: See *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455. The absence of a written lease makes no difference: *Colburn v. Morrill*, 117 Mass. 262, 264, 19 Am. Rep. 415.

The distinction taken by Taylor on Landlord and Tenant, eighth edition, section 379, between eviction and refusal to put the tenant in possession of some privilege which he ought to have enjoyed, very likely is sound with regard to the cases which the author cited and had in mind; that is to say, with regard to cases where the tenant entered and occupied the demised premises, and there was a subsequent failure to perform a covenant for an improvement or one affecting the enjoyment of the premises: *Etheridge v. Osborn*, 12 Wend. 529; *Chicago Legal News Co. v. Browne*, 103 Ill. 317, 320. See, also, *Allen v. Pell*, 4 Wend. 505. And so it might be where there was a known failure at the outset to give possession of all the stipulated land, and the entry of the tenant showed a waiver of compliance with the strict terms of the lease.

Decree affirmed.

SMITH v. McENANY, *Supra*, p. 133.

WARREN v. WAGNER, *Supra*, p. 137.

SEC. 5. PAROL SURRENDER OF LEASE.

LAMAR v. McNAMEE.

10 Gill & J. (Md.) 116; 32 Am. Dec. 152. (1838)

STEPHEN, J. This appeal presents but one question for the decision of this court, and that arises upon the operation of the statute of frauds and perjuries, upon the agreement entered into between the parties, relative to the relinquishment by the appellee, of his unexpired interest in a lease for years, which he held under the appellant. The agreement was by parol, and possession was delivered by the tenant to his landlord, according to the terms of the contract of relinquishment.

It was contended by the appellant in the court below, that the agreement being a verbal one, was inoperative and void by the provisions of the statute of frauds, which requires the surrender of such an interest to be in writing, unless affected by the act and operation of law. The county court refused to sustain the objection, in consequence of which the evidence was permitted to go to the jury, and the plaintiff obtained a verdict. It appears by the bill of exceptions, that the plaintiff to maintain the issue on his part, proved by a competent witness, that on the eleventh of August, 1834, he was called upon by the plaintiff and defendant, to settle a dispute between them, relative to a certain saw-mill, then held by lease in writing by the said plaintiff of him the said defendant; and that said lease would expire on the first day of April, 1835, next ensuing; and also some unsettled accounts existing between said parties relative to said leased premises. The plaintiff also offered in evidence, that the plaintiff agreed to and with the said defendant, to give up and surrender to him the said defendant, the possession of said saw-mill and premises so leased as aforesaid, on the said eleventh day of August, 1834, and also to release and give up his claims against the defendant, for sundry sums of money, laid out by him in repairing the said leased premises, in consideration of which, the defendant promised to pay the said plaintiff the sum of one hundred and thirty-six dollars, for the recovery of which, this action was brought. The plaintiff then offered further to prove by the said witness, that in pursuance of said agreement, he did, on the same day, surrender and give up to said defendant, the actual possession of the said leased premises, and that the defendant has from that day held possession of the same, and that the plaintiff had abandoned or given up his claims for the repairs of the said leased premises. The defendant thereupon by his

counsel, prayed the court to instruct the jury, that upon this proof the plaintiff was not entitled to recover, because the said agreement was by parol, and not in writing, and void by the statute of frauds. This objection being overruled by the court, the defendant appealed to this court, who have now to decide upon the legality of that opinion. After the best consideration we have been able to bestow upon this case, and the question raised in it by the bill of exceptions, we have come to the conclusion, that there is no error in the opinion of the court below, of which the appellant has a right to complain. We think it in perfect accordance with the well-established principles of law, and that the agreement, although by parol, according to the facts given in evidence, was legally efficient, and available to transfer from the appellee to the appellant, all his unexpired interest in the premises, vested in him, by the lease, in virtue of which he held as tenant.

The agreement, although by parol, was not executory, but was immediately executed by the relinquishment of the possession of the premises by the tenant, and a simultaneous taking of the possession by the landlord. The occupation of the one ceased, and that of the other commenced, so soon as the contract was entered into. The principle seems to be well established that, although a tenant who has quitted in pursuance of a parol license from his landlord, and without having given a notice to quit, remains liable; yet if the landlord accepts a third person as his tenant, the acceptance of such substituted tenant operates as a surrender in law of the first tenant's time. For this principle see *Roscoe on Evidence*, 143, 144, and if the acceptance and substitution of a new tenant, will operate as a surrender of the term by operation of law, within the statute of frauds and perjuries, where the possession is vacated by the former tenant, prior to such substitution, it would seem, upon reason and principle, that the taking of possession by the landlord himself, upon the abandonment of the possession by the tenant in pursuance of a parol agreement, ought to have the same effect. His occupation ceases with the consent, and by the act of his landlord, and his liability for rent ought to cease and terminate with it. In 1 English Common Law Reports, an action was brought for the use and occupation of a house. The plaintiff proved that the defendant had been tenant from year to year of his house; the defendant proved a parol agreement, that the plaintiff would give up his claim to the rent on the defendant's giving up immediate possession in the middle of the quarter; both parties accordingly went before a magistrate, and the defendant there gave up the key, which the plaintiff accepted, and the defendant was never after that time in the possession

of the premises. The plaintiff sought to recover for a term subsequent to his resuming the key, and he insisted that the tenancy was not thereby determined by reason of the statute of frauds. In that case, the counsel for the defendant contended, that as a less lease than three years may be created, so might it be surrendered without writing. Gibbs, C. J., observed that the clause of the statute of frauds which restricts estates created by parol to three years, had nothing to do with that which requires surrenders to be in writing. He then observed that the action could not be supported. The plaintiff had taken possession of the house, and the defendant could not therefore occupy it for the same time if he would.

The same principle is established in 15 English Common Law Reports, 229, where the court held, that the action for use and occupation could not be sustained, there being a verbal agreement that the tenant should deliver up the possession of the house which the landlord took accordingly. In this case the decision in 1 English Common Law Reports above referred to, is cited by the court and confirmed.

We do not think that there is anything in the case of *Lammott v. Gist*, 2 Har. & G. 433 (18 Am. Dec. 295), which impugns the principles sanctioned by the above decisions. In that case, the parol agreement to surrender was executory, and had not been consummated by the delivery of possession when the distress was levied by the bailiff of the landlord. The tenant still remained in possession, and it was optional with him whether he would fulfill his contract to surrender or not. Everything rested upon the parol agreement, and that agreement being inoperative and void by the statute of frauds, as he was not bound by it, so neither was it obligatory upon his landlord; for where both parties are competent to contract, a mutuality of obligation is deemed to be essential to its obligatory force upon either. For this principle, if authority be wanted for so plain a proposition, see 3 T. R. 653. In that case, Oxley agreed to sell goods to Cook, if he would purchase them, and give notice of his assent to purchase by a limited period. He gave the notice within the prescribed period, but as the engagement in the meantime was all on one side, the seller was held to be at liberty to recede, upon the ground, that under the circumstances of the case, a mutuality of obligation was wanting. Considering the decision of the court below to be correct, we affirm their judgment.

CHAPTER XXIII.

PUBLIC RIGHTS.

CHEESAPEAKE AND POTOMAC TELEPHONE COMPANY v. MacKENZIE.

74 Md. 36; 28 Am. St. Rep. 220; 21 Atl. 690. (1891)

McSHERRY, J. The declaration in this case alleges, "that the plaintiff is possessed of a lot of ground, with the improvements thereon, being valuable warehouse property, known as No. 22 South Charles Street, and while so possessed the defendant, without her authority or consent, and without making or offering to make compensation therefor, planted a large and unsightly pole in the footway in front of said premises, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the said premises, and though repeatedly notified to remove the said pole, refuses so to do, although a reasonable time for the removal of the same has elapsed," etc. There is added an application for an injunction under section 117 of article 75 of the code. The defendant filed three pleas. The second was the plea of not guilty, and the first and third are as follows, viz.: "That the defendant, at the time of the alleged trespass, was duly incorporated as a telephone company under the laws of the state of Maryland, and was entitled as a corporation so formed in the prosecution of its business, and for the purposes thereof, to erect and maintain the pole upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff, complained of in the declaration of the plaintiff, without making, or offering to make, compensation, therefor to the plaintiff; and that the alleged trespass complained of in the declaration of the plaintiff was a use by the defendant of its said right"; 3. "That the plaintiff ought not further to have or maintain her aforesaid action against it, because it says that by a certain ordinance of the mayor and city council of Baltimore, approved on the ninth day of May in the year 1889, and since the institution of the suit in this cause, it, the said defendant, was and is authorized to maintain, its said pole in and upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff complained of in the declaration of the plaintiff, for the period of two years after the said date of the approval of said ordinance, and so long as said pole is necessary to be maintained by the defendant for the purpose of making distribution of and forming connections between any wire or wires forming part of the underground wire cables

authorized by said ordinance to be laid within the limits of the city of Baltimore." To these pleas,—the first and third,—the plaintiff demurred, and the court of common pleas sustained the demurrer. It is insisted by the appellant, the defendant below, that as the demurrer mounted to the first fault in the pleading, the court ought to have ruled the declaration to be bad, and its failure to do so is assigned as the first error for review on this appeal. We are, of course, confined to the declaration itself in determining its legal sufficiency. * * *

3. Whilst it does not appear from the narr. whether the footway in front of the warehouse premises is a public thoroughfare or not, or whether the title to it is in the plaintiff, it is distinctly alleged that the plaintiff is possessed of a valuable warehouse property, and that without her authority, or consent the defendant planted a large and unsightly pole in front thereof, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the premises. As framed, the narr. alleges a direct interference by the defendant with the use and enjoyment by the plaintiff of her property. And it further alleges that this interference was without her authority or consent. If these facts be true, why do they not furnish a ground of action? That the appellee had the right to the comfortable, reasonable, and beneficial use and enjoyment of her property is undeniably true, unless the contrary be averred and shown. That the unauthorized obstruction of or interference with that right is a wrong which will support an action for damages cannot be open to controversy. Though it might have been more artificial pleading had the mode and manner of the obstruction and interference been set forth in the declaration, they were not necessarily elements of the injury complained of, but rather matters of proof, showing the character and extent of that injury. The narr, on its face, does not declare for an obstruction of the footway or the street; and it was, therefore, not necessary to allege that, by reason of the plaintiff's possession of the premises, she was entitled to the way, in the exercise of which she was interfered with by the defendant. The averment is, that the pole thus planted in the footway obstructed, not the footway, but the plaintiff's use and enjoyment of the property in her possession,—her warehouse; and that averment, it seems to us, is, under the code, sufficient, if proved, to sustain an action. This conclusion is founded, of course, exclusively and solely upon the face of the declaration, without any reference to other parts of the record. * * *

We now come to the consideration of the ruling of the court sustaining the demurrer to the first and third pleas filed by the defendant. These pleas present some of the principal questions discussed in the

argument at the bar. They rely, as a defense to the action, upon an authority which the appellant claims to have under the code, and under an ordinance of the mayor and city council of Baltimore, to plant in its present position the pole complained of, without making or offering to make compensation to the appellee. By sections 224 and 232 of article 23 of the code, telegraph and telephone companies, incorporated under the general corporation law of this state, are empowered to construct their lines along and upon any postal roads and postal routes, roads, streets, and highways, provided their fixtures, posts, and wires do not "interfere with the convenience of any land-owner more than is unavoidable." It is expressly provided in section 224 that "the said corporation shall be responsible for any damages which any person or corporation may sustain by the erection, continuance, and use of such fixtures." It is further provided, that in any action brought for the recovery of damages, the company may elect to have included the damages for allowing the said fixtures permanently to continue. The following proviso is then added: "Provided, that no person or body politic shall be entitled to sue for or recover damages, as aforesaid, until the said corporation, after due notice, shall have failed or refused to remove, in reasonable time, the fixtures complained of." It is not necessary to allude to the ordinance of the mayor and city council of Baltimore, for the reason that whatever authority the appellant possesses, in reference to the planting and maintenance of the pole in question, must be derived from and depend on the act of assembly. The ordinance could not enlarge that authority. To what extent, then, does the statute justify the action of the appellant, and protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the legislature has declared that it shall not be; but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude, without making appropriate provision for just compensation to the owner: *Phipps v. Western Maryland R. R. Co.*, 66 Md. 319; *American Telephone and Telegraph Co. v. Pearce*, 71 Md. 535. In the case last referred to, this court held that planting telephone poles upon the right of way acquired by a railroad company was, when the telephones were used for purposes other than the operation of the road, an additional servitude imposed upon the soil, which entitled the owner of the reversion to an injunction against the telephone company to restrain it from so appropriating the land until compensation, to be ascertained in the method prescribed in section 40, article 3, of the constitution of the state, should be first paid or tendered. And so the condemnation of private property for a highway subjects the

land so taken merely to an easement in favor of the public, and does not divest the owner of the fee; *Thomas v. Ford*, 63 Md. 346; 52 Am. Rep. 513. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful unless the right to do so is acquired by contract or condemnation: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; *Broome v. New York and New Jersey Tel. Co.*, 42 N. J. Eq. 141.

The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains, and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adapted in civilized life, such as water, gas, electricity, steam, and other things capable of that mode of distribution: 2 *Dillon on Municipal Corporations*, secs. 656a, 688. Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee in the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of assembly could not deprive her of it. But in many instances the beds of the streets are owned in fee by the city, and in others the fee is vested in the original owners of the land or their heirs, and does not belong to the owners of the lots abutting on the streets. If the fee be in the city, or in some third person, then,—

1. What are the rights, in a case like this, of the owner of a lot abutting on the street? and
2. How are those rights affected by the provisions of the code relied on in the pleas?

There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far,—and we are not required to go any further in deciding this appeal,—that where the fee or legal title has

passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil, or ejection, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain: *Elizabeth etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; affirmed in 7 Wall. 272; *Cooley on Constitutional Limitations*, 556. Indeed, this is merely the application of familiar principles of the common law

Whether, then, the appellee be the owner of the reversion in the bed of the street, or only entitled to the rights of an abutter on the street, the pleas demurred to set forth no facts which furnish a defense to the action; because, as against the owner of the fee, the provisions of the code relied on in the pleas are inoperative for the reasons we have given; and as respects the owner of a lot abutting on the street, they expressly reserve, and they could not have validly denied, his right to recover for such direct and immediate injuries as he might sustain by the construction of a line of telegraph and telephones upon a public street or thoroughfare. Whether the damages to be recovered shall be upon the basis of the permanent occupation of the premises, or only for the period up to the bringing of the suit, is left to the election of the company; and it would necessarily follow, if the recovery should be limited at its instance to the latter period, that subsequent suits could be brought; and in an appropriate case an injunction could be procured to prevent a continuance of the interference. It results, then, that neither the rights of the owner of the reversion nor those of the abutter upon a street are abridged by the statute, and that, in so far as that statute attempts or was intended to effect that result, it is nugatory and inoperative. As a consequence, whatever rights the appellant did acquire under the statute are subordinate to the property rights of the appellee, and the pleas which rely upon the statute and the ordinance as giving the appellant authority to plant and maintain its posts and wires, without regard to the injury caused the appellee, were very properly declared to be no answer to the action. * * *

CHAPTER XXIV.

CONVEYANCES OF LAND.

- Section 1. Grants by the United States.
- Section 2. Conveyances by Individuals.
- Section 3. Form and Essentials of Conveyances.
- Section 4. Covenants of Title.
- Section 5. Execution.

SEC. 1. GRANTS BY THE UNITED STATES.

McGARRAHAN v. MINING CO.

96 U. S. 316; 24 L. Ed. 630. (1877)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Federal question in this case is, whether the record in the volume kept at the General Land-Office at Washington for the recording of patents of the United States issued upon California confirmed Mexican grants, relied upon by McGarrahan as evidence of his title, proves a conveyance by the United States of the land in controversy to Vicente P. Gomez, his grantor. In his behalf, it is contended that the record is itself the grant; or, if not, that it proves the issue to Gomez of a patent which does grant the legal title to the property described.

That the record is not itself the grant of title is evident. The thirteenth section of the act "to ascertain and settle the private land claims in the State of California" (9 Stat. 631) provides, that, "for all claims finally confirmed, * * * a patent shall issue to the claimant upon his presenting to the General Land-Office an authentic copy of such confirmation and a plat of the survey," &c. By sect. 8 of the "act for the establishment of a general land-office in the Department of the Treasury" (2 id. 717), it is enacted, that "all patents issuing from the said office shall be issued in the name of the United States and under the seal of said office, and be signed by the President of the United States, and countersigned by the commissioner of said office, and shall

be recorded in said office in books to be kept for the purpose." Thus the patent executed in the prescribed form which issues from the General Land-Office is made the instrument of passing title out of the United States. The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant has been issued.

The record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the General Land-Office. If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. In short, the record, for the purposes of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy. The same defences can be made against the record as could be made against the instrument recorded. The public records of the executive departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transaction of the department.

This brings us to inquire whether this record shows upon its face the execution of a patent sufficient in law to transfer the title of the premises in controversy from the United States. And here it may not be improper to note, that although the case shows that in July, 1870, before this suit was commenced, the commissioner of the General Land-Office and the recorder caused to be entered upon the face of the record, over their official signatures, a statement to the effect that the instrument in question was never in fact executed or delivered, McGarrahan rests his whole case upon the record and the evidence it furnishes. This he has the undoubted right to do; but, if he does, he must stand or fall by what it proves. It is his own fault, if, having a valid patent in his possession, he fails to produce it.

By the first section of the "Act to reorganize the General Land-Office" (5 Stat. 107), it was provided that the executive duties relating "to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the General Land-Office, under the direction of the President of the United States;" and by the fourth section, "that there shall be appointed by the President, by and with the consent of the Senate, a

recorder of the General Land-Office, whose duty it shall be, in pursuance of instructions from the commissioner, to certify and affix the seal of the General Land-Office to all patents for public lands, and he shall attend to the correct engrossing and recording and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees, and of persons entitled to patents * * *." By the sixth section, it was further provided that "it shall be lawful for the President of the United States, by and with the advice and consent of the Senate, to appoint a secretary, * * * whose duty it shall be, under the direction of the President, to sign, in his name and for him, all patents for lands sold or granted under the authority of the United States." By the second section of the act of March 3, 1841 (id. 416), the duty of countersigning patents was transferred from the commissioner of the General Land-Office to the recorder. Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land-Office, and countersigned by the recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may prescribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands cannot be conveyed except in the form provided by law.

But if either of the requisites to the due execution of a patent may be considered as directory, the countersigning by the recorder should not be permitted to occupy that position. The President may sign by his secretary, but the recorder must sign himself. He countersigns, that is to say, signs opposite to and after the President, by way of authentication. Being specially charged with the duty of attending to the issue of patents, it is peculiarly appropriate that his attestation

should be the last act to be performed in the perfection of the instrument, and that he should do it personally.

The record in this case shows an instrument in the form of a patent, signed in the name of the President, and sealed. The place for the signature of the acting recorder is left blank. The name of the President is signed by his secretary. The claim which is made, that Stoddard, the secretary, also countersigned as acting recorder, is not sustained by the evidence. His signature appears only as secretary, and there is nothing whatever to indicate that he attempted to act as recorder. Besides, the law provides (5 Stat. III, sect. 8), "that whenever the office of recorder shall become vacant, or in case of the sickness or absence of the recorder, the duties of his office shall be performed *ad interim* by the principal clerk on private land claims." It certainly is not to be presumed that the same person will hold at the same time the offices of secretary to the President for signing patents, and of principal clerk on private land claims. And if it were, his signature as secretary will not be treated as his signature as recorder *ad interim* or acting recorder. He must sign both as secretary and as recorder.

The case is, therefore, one in which the record shows upon its face an instrument prepared for a patent but not countersigned by the recorder. If a patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant actually perfected. But it is said that the record of the paper is evidence of the fact that the recorder recognized its completeness, and is equivalent to its countersignature. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the government. To be valid, a patent must be actually executed. Before it can operate as a grant, the last formalities of the law prescribed for its execution must be complied with. No provision is made for an equivalent of these formalities. Even an actual delivery of the patent by the recorder in person would not supply the place of his countersignature, any more than the delivery of a paper by a private person without being signed would make it his deed. But the record of a patent would not be necessarily as much a recognition of its validity as a personal delivery by the recorder, because he only attends to the recording, and is not required to do it in person. The only way in which he can lawfully and effectually recognize the validity of a patent is by personally countersigning it.

Again, it is said that the act of March 3, 1843 (5 Stat. 627), remedies the defect, because it provides "that literal exemplifications of any such records which may have been or may be granted in virtue of

the provisions of the seventh section of the act, * * * entitled 'An Act to reorganize the General Land-Office,' shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record." This act does not, however, dispense with the signing and countersigning. The record, to prove a valid patent, must still show that these provisions of the law were complied with. The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued. If they are partially inserted in the record, it will be presumed that they fully appeared in the patent; but no such presumption will be raised if no signature is shown by the record. Here no signature does appear, and consequently none will be presumed.

The failure to record the patent does not defeat the grant. It only takes from the party one of the means of making his proof. If he can produce the patent itself, and that is executed with all the formalities required by the law, he can still maintain his rights under it. He is not, therefore, necessarily deprived of his title because of a defective record. He is in no worse condition with the signatures omitted than he would have been if the description of his land had been erroneously copied, or other mistakes had been made which rendered the record useless for the purposes of evidence. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way, than by the record. It is undoubtedly true, that, when a right to a patent is complete and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record will be treated as presumptive evidence of its delivery to and acceptance by the grantee. But until the patent is complete, it cannot properly be recorded, and consequently an incomplete record raises no such presumption.

Again, it is said that the record of an instrument which the law requires to be recorded is *prima facie* evidence of the validity of the instrument. That is undoubtedly true, if the instrument recorded is apparently valid. The presumption arising from the record is, that whatever appears to have been done, actually was done. If the record shows a perfect instrument, the presumption is in favor of its validity;

but if it shows an imperfect instrument, a corresponding presumption follows. Here the instrument recorded appears to have been incomplete, and consequently it must be presumed to be invalid. This presumption will continue until overcome by proof that the instrument as executed and delivered was valid.

We are of the opinion that, because this record does not show a patent countersigned by the recorder, it is not sufficient to prove title in the party under whom McGarrahan claims. This makes it unnecessary to consider any of the other questions which have been argued; and the judgment is affirmed.

FIELD v. SEABURY et al.

19 How. (U. S.) 323; 15 L. Ed. 650. (1856)

MR. JUSTICE WAYNE delivered the opinion of the court:

* * * This case involves directly the point whether, when a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee; and thus look beyond the patent or grant.

We are not aware that such a proceeding is permitted in any of the courts of law. In England, a bill in equity lies to set aside letters patent obtained from the King by fraud, (*Att. Gen. v. Vernon*, 277, 370; the same case, 2 Ch. Rep., 353,) and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee. But in neither could a patent be collaterally avoided at law for fraud. This court has never declared it could be done. *Stoddard and Chambers* (2 How., 284) does not do so, as has been supposed. In that case, an act of Congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmee, under any law of the United States, or had been surveyed and sold by the United States; and this court held that a location made on land reserved from sale by an act of Congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmee was made perfect by the act of con-

firmation, and without any patent, as against the prior patent, which was simply void; and this valid legal title enured at once to the benefit of an assignee of the confirmer. In this connection it must be remembered that we are speaking of patents for land, and not of transactions between individuals, in which it has been incidentally said, by this court, that deeds fraudulently obtained may be collaterally avoided at law. (*Gregg v. Sayre*, 8 Peters, 244; *Swayzer v. Burke*, 12 Peters, 11.). * * *

HUSSMAN v. DURHAM.

165 U. S. 144; 41 L. Ed. 664; 17 Sup. Ct. 253. (1897)

This case comes up on error to the supreme court of the state of Iowa. The facts are these: On May 19, 1858, Robert Craig located bounty land warrant No. 27,911, issued to William Long under the act of congress of March 3, 1855 (10 Stat. 701), upon the land in controversy, and obtained from the proper land officer a certificate of location. This certificate was recorded in the office of the recorder of Carroll County, the county in which the land is situated. No patent was issued thereon. On February 1, 1864, the secretary of the interior canceled the land warrant, under authority of an act of congress of date June 23, 1860 (12 Stat. 90). This act provided that whenever it should appear that any land warrant was lost or destroyed, whether the same had been sold or assigned by the warrantee or not, the secretary of the interior should cause a new warrant to be issued, which new warrant should have all the force and effect of the original, and upon such action the original warrant was to be deemed and held to be null and void, and any assignment thereof fraudulent; and, further, that "no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration." The second section authorized the secretary to prescribe such rules and regulations as might be appropriate for carrying the act into effect. It was alleged in the petition filed in this case that, the assignment on the warrant purporting to be that of Long, the warrantee was a forgery, and this allegation was admitted by the defendant. The action of the secretary was taken without, so far as appears, any notice to Robert Craig. Nothing was done, either

in the local land office or in the land department at Washington, to formally cancel the certificate of location. Up to the year 1886 the records of the land department showed on their face a full, equitable title passing to Robert Craig by virtue of his certificate of location, and payment therefor in a land warrant. During these years the land was subjected to taxation by the officers of Carroll county, Iowa, and was sold for nonpayment of taxes; and the titles under such tax sales passed to Bernhard Hussman, defendant below.

In 1886 William H. Durham, plaintiff below, having obtained conveyances from Craig, applied to the land department for leave to purchase the land upon payment of the regular price. This application was granted under authority of rule 41 of the department of the interior, published on July 20, 1875, which reads as follows:

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash or any kind of script legally applicable to the class of lands embraced in the entry."

The money, \$150, was paid by Durham in 1888, and a patent issued, of date October 3, 1889, to Robert Craig, his heirs and assigns. It recited a payment by "F. M. Hunter, trustee for Robert Craig," and was delivered to said trustee, to be held until the rights of these parties could be judicially determined. Thereupon Durham commenced this suit in the district court of Carroll county, Iowa, to quiet his title as against the defendant, holding the tax titles. The district court entered a decree in his favor, which was affirmed by the supreme court. 88 Iowa, 29, 55 N. W. 11.

MR. JUSTICE BREWER, after stating the facts, delivered the opinion of the court.

A motion to dismiss was submitted by the defendant in error, but as the supreme court of the state held that the equitable title apparently conveyed by the proceedings in the United States land office in 1858 was of no effect, and the tax titles bases thereon of no validity, it is apparent that a right claimed under the authority of the United States was denied, and therefore this court has jurisdiction.

On the merits of the case, we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation (*Carroll v. Safford*, 3 How. 441; *Witherspoon*

v. Duncan, 4 Wall. 210), yet until such equitable title has passed, and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax (*Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444; *Tucker v. Ferguson*, 22 Wall. 527, 572; *Colorado Co. v. Commissioners*, 95 U. S. 259). Therefore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig.

We remark, in the second place, that, under such a tax law as exists in Iowa, there is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from but is antagonistic to, the former. The holder of the latter is not a privy in estate with the holder of the former. Neither owes any duty to the other, nor is estopped from making any claim as against the other. *Hefner v. Insurance Co.*, 123 U. S. 747, 751, 8 Sup. Ct. 337; *Turner v. Smith*, 14 Wall. 553; *Crum v. Cotting*, 22 Iowa, 441; *Burroughs, Tax'n*, 346.

Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backward than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1858, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day. In other words, the United States does not part with its rights until it has actually received payment, and if, by mistake, inadvertence, or fraud, a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere. Thus, in *Reynolds v. Plymouth Co.*, 55 Iowa, 90, 7 N. W. 468, it appeared that certain forged and counterfeit agricultural college scrip was located upon a tract of land, and that after the issue of the certificate of location, and before any patent, state taxes were assessed and levied thereon. Thereafter the forgery was discovered, the locator substituted genuine scrip or money, and a patent was issued. The court held that the taxes thus assessed and levied during the interval between the original illegal entry and location and the subsequent substitution of genuine scrip or money were invalid, saying: "In order to protect a title, or to attain the ends of justice, the courts will, under

the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine cannot be invoked to burden the holder of a title, and require him, in violation of justice, to pay taxes when he held neither the equity nor title of the lands." A similar doctrine was announced in *Calder v. Keegan*, 30 Wis. 126. See, also, *Gibson v. Chouteau*, 13 Wall. 92, in which this court, on page 101, said: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or 'equitable title,' as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

It is, however, said by counsel for plaintiff in error that, as it does not appear that any notice was given to Craig, the finding of the secretary of the interior that the assignment was a forgery, and the order directing the cancellation, cannot be regarded as binding upon Craig, or affecting the rights vested in him by the surrender of the land warrant and the issue of the location certificate. In other words, as in this respect the secretary of the interior is a tribunal with limited and special jurisdiction, proof of notice to the parties interested is essential to sustain the validity of any adjudication. Not questioning the proposition of law as thus stated, there are two sufficient answers to its applicability to the present case: First as Craig and those claiming under him thereafter dealt with the government upon the assumption that the adjudication was binding, one who is not in privity with them cannot challenge their acceptance of that adjudication; and, secondly, on the record the parties hereto have admitted that the assignment of the warrant by Long to Craig was a forgery. Craig therefore had no title to the warrant, and this formal surrender by him of the instrument was an invalid act, neither defeating the title of Long, nor releasing the government from its promise to convey to Long or his genuine assignee the specified number of acres.

The case therefore stands in this way: Confessedly, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land, and the government received nothing until 1888. During these intervening years, whatever might have appeared upon the face of the record, the legal and the equitable title both remained

in the government. The land was therefore not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him, and has no tax title arising subsequently thereto.

With respect to the suggestion of counsel that it is a hardship that one who has changed wild land into a farm, and greatly improved it, should, after the lapse of many years, be deprived of the benefit of those improvements by reason of an undisclosed defect in the record title, it is sufficient to say that there is nothing in this record to indicate that the defendant ever made any improvements or expended a dollar otherwise than in paying for the tax title. We cannot, of course, take the intimation of counsel in the brief as evidence of a fact not appearing on the record. Further, so far as the money paid for taxes is concerned, it is familiar law that a purchaser of a tax title takes all the chances.

There is no warranty on the part of the state. Beyond this, the statutes of Iowa contemplate a return of taxes when it is disclosed that the land was not subject to taxation. 1 McClain's Rev. St. 1888, 1387, p. 353. We see no error in the decision of the supreme court of Iowa, and it is therefore affirmed.

SEC. 2. CONVEYANCES BY INDIVIDUALS.

FISHER v. STRICKLER.

10 Pa. St. 348; 51 Am. Dec. 488. (1849)

Ejectment by one of the heirs of Christian Strickler, deceased, for a portion of the estate of such deceased. The defendant was a brother of the deceased, and claimed the whole estate, by virtue of an agreement between him and his brother, which was recorded after the latter's death, by which they agreed, in effect, that if either should die, without issue, the survivor should be the sole heir of the one deceased, and entitled to the sole possession and ownership of his estate. Judgment was given for the defendant, Hayes, P. J., delivering the following opinion: "The instrument of writing set forth in this case, is what is technically called a covenant to stand seised to uses. The words

are sufficient to create the covenant, the intention being apparent on the face of this deed, that each party should stand seised to the use of the other surviving him, under the circumstances stated. And the consideration of natural love, though not expressed, is manifest from the relation of the parties; and as this, being consistent with the deed, might be averred in pleading, and admitted in evidence, it is not essentially necessary that it should be mentioned in the instrument: *Milburn v. Salkeld*, Willes, 673; *Bedell's Case*, 7 Rep. 40; *Crossing v. Scudamore*, 1 Vent. 137; 3 *Cruise's Dig.*, part 4, p. 186, 190. Being of this opinion, I think judgment, on the case stated, should be for the defendant."

ROGERS, J. After a careful examination of the authorities cited, we concur in the opinion that this is a covenant to stand seised to uses. The judgment is therefore affirmed, for the reasons given by Judge Hayes. We perceive nothing in the contract, as contended, in conflict with the law or policy of this state, either as it affects the collateral inheritance tax or the dower of any future wife.

Judgment affirmed.

BLAKE v. DICK, *Supra*, p. 98.

WOOD v. CHAPIN.

13 N. Y. (3 Kernan), 509; 67 Am. Dec. 63. (1856)

* * * DENIO, C. J. The question presented in this case is strictly one of legal title. The plaintiff deduced a good paper title from William Helm, who is admitted to have been the owner in fee of the premises, unless one or more of the objections interposed by the defendant to the evidence are well taken.

1. The deed from Fitzhugh was not acknowledged, and there was no subscribing witness to it, and consequently it had never been recorded. It is urged that this defect rendered it void: 1 R. S. 738, sec. 137. It was, however, effectual to transfer title as between the parties to it. It would be invalid as against a subsequent purchaser from or an incumbrancer under Helm. But the defendant does not occupy such a position. * * *

I am of opinion that plaintiff made out a *prima facie* case showing title in himself.

The defendant attempted to show title out of the plaintiff and in Z. A. Leland, under whom he entered and cut the timber. The most favorable view for the defendant which can be taken of the instrument given in evidence by him is to consider it a conveyance of an undivided half of all Helm's property, and an equitable mortgage of the other half to secure any future advances which Leland and Skinner might see fit to make. It would clearly be a conveyance of an undivided moiety of Helm's property, but for the want of a consideration. But no consideration was expressed in the paper, and none was proved outside of it. Leland and Skinner did not undertake to advance anything. They did not execute the deed, and there are no expressions in it by which they were bound to do anything in consequence of their acceptance of it, or which would have amounted to a covenant on their part if they had executed it; and there was no collateral agreement, verbal or written, by which they undertook to advance anything to Helm or to do anything for him. If the deed had any operation, it was by way of bargain and sale under the statute of uses. No livery of seisin is pretended to have been given, and there was no such relationship between the parties as is necessary to support a covenant to stand seised. A bargain and sale before the statute of uses rested on the goodness of the consideration, and hence it was that a consideration became the great point upon which deeds of conveyance turned, which were invented after the statute in order to raise and convey uses: Reeve's Hist. Eng. Law, 162, 163, 353, 355; Rector of Chedington's Case, 1 Co. 154; Wiseman's Case, 2 Id. 15; Shep. Touch., c. 10, p. 5. It is perfectly well settled in this state, that to constitute a good conveyance by way of bargain and sale there must be a valuable consideration expressed in the deed, or proved independently of it. If one is expressed, no proof of its actual payment need be given, and it cannot be controverted by evidence, and it is sufficient, though the amount be merely nominal: Jackson v. Alexander, 3 Johns. 484 (3 Am. Dec. 517); Jackson v. Fish, 10 Id. 456; Jackson v. Florence, 16 Id. 47; Jackson v. Sebring, Id. 515 (8 Am. Dec. 357); Jackson v. Caldwell, 1 Cow. 622. It is no doubt true that the insertion of a consideration has become a mere ceremonial observance. It is, however, a form required by law where there is no evidence of an actual consideration, and we have no more right to dispense with it than with any other legal requirement. I am of opinion, therefore, that the deed was void for want of a consideration. It was executed before the

enactment of the revised statutes, and we are not therefore called upon to consider the effect of the provision which the legislature has made respecting grants of freehold estates: 1 R. S. 738, secs. 136, 137.

But whatever might have been the effect of the deed to Leland and Skinner at the common law, I am of opinion that it has become invalid as against the plaintiff by the operation of the recording acts. Helm, the source of title, conveyed to Fitzhugh, and he conveyed to Thornton. Neither of these grantees could hold the land against the prior grantees of Helm, for the former had knowledge of the prior deed, and the latter did not cause his deed to be recorded. But Thornton conveyed to Smith for a pecuniary consideration, expressed in the deed, and acknowledged to have been paid; and Smith put his deed on record. Smith was not prejudiced by the knowledge which Fitzhugh had of the conveyance to Leland and Skinner. If one affected with notice conveys to another without notice, the latter is as much protected as if no notice to either had ever existed: *Jackson v. Given*, 8 Johns. 137 (5 Am. Dec. 328); *Varick v. Briggs*, 6 Paige, 323. 329. Smith acquired Fitzhugh's title, by means of the conveyance of the latter to Thornton and of Thornton's conveyance to him, as effectually as though Fitzhugh had conveyed directly to Smith. It was unnecessary for the plaintiff to prove that Smith paid a consideration. The acknowledgment in the deed of the payment of a consideration is, uncontradicted, sufficient evidence of the fact of such payment: *Jackson v. McChesney*, 7 Cow. 360 (17 Am. Dec. 521). If Smith acquired a good title against Leland and Skinner by virtue of the recording acts, as I have shown he did, the plaintiff would be entitled to protection, though he had purchased with full notice of the prior deed. It is not material, therefore, to consider whether the plaintiff's purchase, under the attachment proceedings instituted by himself, constituted him a *bona fide* purchaser within the construction which has been given to the recording acts. It is enough that the purchase from the trustees gave him the title which Smith had. Smith's title being perfect against Leland and Skinner, the plaintiff, being clothed with that title, can hold the land against them: (citing cases) I am moreover of opinion that a purchaser under judicial proceedings instituted by himself, though the purchase be made on account of the debt for the recovery of which the proceedings were had, is a *bona fide* purchaser within the statute. The legal expenses necessarily incurred, which have to be advanced by the party promoting the proceeding, are something in addition to the existing debt which the purchaser has parted with as a consideration for the conveyance which he receives.

If these views are correct, the case was properly disposed of in the supreme court, and the judgment appealed from should be affirmed.

* * *

UNITED STATES v. CALIFORNIA & ORGEON LAND CO.

148 U. S. 31; 37 L. Ed. 354; 13 Sup. Ct. 458. (1893)

* * * As against these evidences and conclusions of good faith but a single proposition is raised, one upon which the dissenting judge in the circuit court of appeals rested his opinion, and that is the proposition that the conveyances from the road company were only quitclaim deeds, and that a purchaser holding under such a deed cannot be a *bona fide* purchaser, and in support of this proposition reference is made to the following cases in this court: *Oliver v. Platt*, 3 How. 410; *Van Rensselaer v. Kearney*, 11 How. 297; *May v. Le Claire*, 11 Wall, 217, 232; *Villa v. Rodriguez*, 12 Wall, 323, 339; *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 U. S. 494; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. Rep. 147. The argument, briefly stated, is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter, taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus in *Baker v. Humphrey*, 101 U. S. 494, 499, Mr. Justice Swayne, in delivering the opinion of the court, uses this language: "Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation." Yet it may be remarked that in none of these cases was it necessary to go to the full extent of denying absolutely that a party taking a quitclaim deed could be a *bona fide* purchaser; and in the later case of *McDonald v. Belding*, 145 U. S. 492, 12 Sup. Ct. Rep. 892, it was held, in a case coming from Arkansas, and in harmony with the rulings of the supreme court of that state, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a *bona fide* purchaser for value although holding under a deed of that kind; and in that case the grantee so holding was protected as a *bona fide* purchaser; while in the case of *Moelle v. Sherwood*, (just decided,) 148

U. S. 21, 13 Sup. Ct. Rep. 426, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a *bona fide* holder, and the expressions to the contrary in previous opinions were distinctly disaffirmed.

But, further, and even if the doctrine were now recognized to be as heretofore stated, this fact would take the case out from the reach of the rule. The title passed from the road company to the purchasers by four conveyances; two from the road company to one Pengra, its agent and superintendent, and two from Pengra to the purchasers. Now, the deeds from Pengra, are not quitclaims. They do not purport to be merely releases of his right, title, and interest, but are strictly deeds of bargain and sale. The granting clause is in these words: "The said parties of the first part have aliened, released, granted, bargained, sold, and by these presents they do alien, release, grant, bargain, sell, and convey, unto the said parties of the second part, their heirs and assigns, in proportions hereafter specified, the equal undivided one-half ($\frac{1}{2}$) of all and singular the lands lying and being in the state of Oregon, granted or intended to be granted to the state of Oregon by act of congress," etc. And the *habendum* is: "To have and to hold, all and singular, the lands and premises hereby conveyed, to wit, said undivided one-half of all the above-described grant of lands, listed and to be listed, and all the right, title, and interest of the party of the first part therein."

Such a deed is clearly something more than one of quitclaim and release. It is a deed of bargain and sale, and will convey an after-acquired title. Such is the ruling of the supreme court of Oregon. *Taggart v. Risley*, 4 Or. 235. Now, even in those courts in which the rule was announced that one who takes under a quitclaim deed cannot be a *bona fide* purchaser, it was sometimes limited to the grantee in such a deed, and not extended to those cases in which a quitclaim was only a prior conveyance in the chain of title, (*Snowden v. Tyler*, 21 Neb. 199, 31 N. W. Rep. 661) and this is certainly a most reasonable limitation, because the rule is obviously, at the best, arbitrary and technical; for a party who receives a quitclaim deed may act in the utmost good faith, and in fact be ignorant of any defect in the title, and this, although he has made the most complete and painstaking investigation, and only takes the quitclaim deed because the grantor, for expressed and satisfactory reasons, declines to give a warranty. It would be unfortunate, in view of the fact that in so many chains of title there are found quitclaim deeds, to extend a purely arbitrary rule

so as to make the fact of such a deed notice of any prior defect in the title.

It may be said that the real transaction was between the road company and the purchasers; that the agent and superintendent of the road company was merely a go-between,—a conduit through which the title passed from the road company to the purchasers; and that the spirit, if not the letter, of the rule requires that the form of conveyance used by the road company should be controlling as to the *bona fides* of the purchasers. But as it is, wherever enforced, a merely technical and arbitrary rule, justice requires that it should not be carried beyond its express terms, nor used to disprove the good faith, which, in this case, all the other testimony shows in fact existed in the purchasers. And in this respect it is well to consider the obvious reason for the unwillingness of the road company to itself execute a warranty deed. The original act of 1864 said nothing about patents. It simply granted the lands to the state, and authorized their sale; and only after the arrangement had been made for the purchase of one-half of these lands, and the conveyances made therefor, was the act of 1874 passed, providing in terms for patents. The claim of the road company was that their title was a perfect legal title, even without a patent; and yet, there being a doubt in respect thereto,—a doubt which was solved only by the act of 1874,—it was not strange that it preferred to quitclaim its interest in the granted lands, rather than to formally convey them by a warranty of the legal title. But it is not to be inferred therefrom as a matter of law that the road company in any way doubted its full equitable title, or that, by the fact of a quitclaim, it notified the purchasers of any other matter than this omission in the statute. On the contrary, the plain import of the language used in the conveyance from the road company to Pendra was that it intended to convey the lands which it had received under the grant, and to which it believed it then had a full, equitable, if not legal, title. Our conclusions, therefore, are that the decision of the circuit court and the court of appeals was correct. * * *

SEC. 3. FORM AND ESSENTIALS OF CONVEYANCES.

CRIBBEN v. DEAL.

21 Oregon, 211; 28 Am. St. Rep. 746; 27 Pac. 1046. (1891)

LORD, J. This is a suit in equity, brought by the plaintiffs to have a deed of general assignment set aside and declared void, and to have the attached property applied in payment of their judgment. The single proposition of law involved is, whether the name of the grantee can, by someone authorized upon parol authority of the grantor, be inserted in a blank left in a deed of general assignment, after the deed has been signed, sealed, and acknowledged, but before delivery. For the purposes of this case, the facts are these: That the deed of assignment was made on the 17th of November, 1888, by C. E. Deal, J. C. O'Reilly, and J. W. Brockett, partners doing business under the firm name of Deal, O'Reilly, & Co., to Thomas Connell for the benefit of creditors; that it was in all things completed and signed and sealed and acknowledged, except that a blank was left for the name of the grantee; that Mr. F. A. E. Starr was authorized to insert as the name of such grantee any person satisfactory to himself and the members of such firm; that on the following day, Mr. Starr, with the consent of the members of such firm, inserted the name of Thomas Connell as assignee in such deed, and the deed was delivered to Thomas Connell, and on the next day was recorded. Upon this state of facts the contention is, that such deed is void because the name of Thomas Connell was not inserted when the deed was signed and sealed.

It is said in Sheppard's Touchstone, 54, that "every deed well made must be written, i. e., the agreement must all be written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper, or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This is founded upon that ancient and technical rule of the common law, that the authority to make a deed, or to alter or fill a blank in some substantial part of it, cannot be verbally conferred, but must be created by an instrument of equal dignity. As the deed was under seal, to alter or complete it by the insertion of the name of the grantee required the authority to be under seal. So firmly rooted was this principle, that it mattered not with what solemnities a deed may have been signed and sealed, unless the grantee's name was inserted, and delivery was made by him, or

someone legally authorized under seal, it was a nullity. It imposed no liability on the party making it, nor conferred any rights upon the party receiving it; it was, in fact, no deed. Hence, it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law, and rendering the deed void. This doctrine still prevails in England.

It is true that in the case of *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 225, Lord Mansfield held otherwise; but this was in effect overruled in *Hibblewhite v. McMorine*, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by deed, although this latter case seems more or less trenched upon by the decision in *Eggleston v. Gutteridge*, 11 Mees. & W. 465, and by *Davison v. Cooper*, 11 Mees. & W. 778, and in *West v. Steward*, 11 Mees. & W. 47. But the rule has never been universally accepted in this country; and however the holding of some courts may be, still the better opinion and the prevailing current of authority is, that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that when so filled out and delivered, it is a valid deed.

It is true that Chief Justice Marshall, in *United States v. Nelson*, 2 Brock, 74, felt bound to follow the ancient rule, but his opinion clearly indicates he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of *Speake v. United States*, 9 Cranch, 28, in determining that parol evidence of such assent may be received, undoubtedly goes far toward deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have." And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion with the defendants."

The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason fails, the law itself should fail. At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing

away with them. As Judge Redfield said: "But it (the rule) seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country. And the prevailing current of American authority, and the practical instincts and business experience and sense of our people, are undoubtedly otherwise." 1 Redfield on Law of Railways, 124.

In *Drury v. Foster*, 2 Wall, 24, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration, or addition to a sealed instrument, the better opinion of this day is, that the power is sufficient." Again in *Allen v. Withrow*, 110 U. S. 119, the court says: "It may be and probably is the law in Iowa, as in several states, that the grantors in a deed conveying real property, signed and acknowledged with a blank for the name of a grantee, may authorize another party by parol to fill up the blank." "But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled.

In *Inhabitants etc. v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, Kent, J., said: "The rule invoked is purely technical. Practically there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange; both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Likewise in *Bridgeport Bank v. New York, etc., R. R. Co.*, 30 Conn. 274, Ellsworth J., said: "Nor can any reason be assigned which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may

not be filled up by the party receiving it after it is executed as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinctions between them."

It is to be noted that both of these adjudications were by courts of states where seals were not abolished. In *Burnside v. Wayman*, 49 Mo. 357, where the name of a grantee in a trust deed was left in blank, *Wagner, J.*, said: "It is contended that no recovery could be had or relief granted on the first count, because no grantee was named in the deed of trust, and that in consequence thereof the instrument was void, and no title conveyed; but we think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position." And subsequently, in *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435, this doctrine was affirmed in all its breadth, the court saying: "A deed regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence, and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed." In *Duncan v. Hodges*, 4 McCord, 239, 17 Am. Dec. 734, it is held that a deed executed with blanks, and afterwards filled up and delivered by the agent of the party, is good. So in *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486, it was held that where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure from whomsoever he could a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery. And the same doctrine was expressly affirmed in *Schintz v. McManamy*, 33 Wis. 301, the court, by *Lyon, J.*, saying: "It was doubtless competent for the grantors to authorize Emil by parol to insert the name of the grantee in the deed after they had signed and acknowledged the same." And in *State v. Young*, 23 Minn. 551, it was held that authority to fill a blank in a sealed instrument may be given by parol, and that such authority may be either express or implied from circumstances, and that it may be implied from circumstances whenever these, fairly considered, will justify the inference. So in *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470, where the owner of land

executed a deed in blank and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by someone authorized by him, made the instrument perfect as a conveyance.

Without referring to the authorities at greater length, there are numerous other cases supporting the same doctrine: *Wiley v. Moor*, 17 Serg. & R. 438; 17 Am. Dec. 696; *Smith v. Crooker*, 5 Mass. 538; *Gibbs v. Frost*, 4 Ala. 720; *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246; *Ex parte Decker*, 6 Cow. 60; *Richmond Mfg. Co. v. Davis*, 7 Blackf. 412; *Boardman v. Gore*, 28 N. J. Eq. 517; 18 Am. Dec. 73; *Camden Bank v. Hall*, 14 N. J. L. 583; *Ragsdale v. Robinson*, 48 Tex. 379. The contrary rule was adopted in *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266; *Preston v. Hull*, 22 Gratt. 600; 14 Am. Dec. 153; *Ingram v. Little*, 14 Ga. 173; 58 Am. Dec. 549.

It seems to us that the weight of authority and better opinion is, that parol authority is sufficient to authorize the filling of a blank by the insertion of the name of the grantee in a deed after its execution but before delivery, as in the case at bar. There is no pretense of any mistake or fraud, or that the blank was not filled as authorized and directed. In a word, that it was filled by a party authorized to fill it, and was done after its execution and before its delivery to the grantee named. Nor is it questioned but what the deed faithfully expresses the intention of the parties, and was duly executed for the purposes specified; and in such case it seems to us complete effect ought to be to that intention, notwithstanding the technical rule of the common law in respect to such instruments. As Mr. Justice Swayne said: "If a person competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not be well controverted": *Drury v. Foster*, 2 Wall, 24.

It results that the decree dismissing the bill must be sustained.

EVENSON v. WEBSTER.

3 S. D. 382; 44 Am. St. Rep. 802; 53 N. W. 747. (1892)

CORSON, J. This was an action brought by the plaintiff as the sister and only heir of Staale Simonson, deceased, to recover the possession of one hundred and sixty acres of land in Minnehaha county, of which it is alleged said Simonson died seised. The case was tried by the court without a jury, and upon the facts found by the court, and its conclusions of law, judgment was rendered for the defendant. From this judgment the plaintiff appeals.

* * * The trial court found that in November, 1879, Staale Simonson was the owner of the premises in controversy, and "that on the twentieth day of November, 1879, at said county and territory, said Staale Simonson executed and delivered to one Hans Larson a certain instrument in writing, of which the following is a copy:

"November 20, 1879.

"A will between Staale Simonson and Hans Larson.

"I, Staale Simonson, being a single man, about sixty-four years of age, and have never been married, and have no children, I have made agreement with Hans Larson that he is and shall take care of me from this day to my death day, and I, Staale Simonson, give him all of my goods and chattels and real estate, all property of all kinds of any description that I own, except fifty dollars, which I give Gurene Johnson. Hans Larson is to pay her when the land is sold or within five years from date. There is no person of any if my relation that have any right to any of said property except all debts shall be paid by Hans Larson that I owe, the mortgage against the land and other debts. The description of the land: S. W. qr. S 26, T. 101, R. 48.

his

"Staale X Simonson.
mark.

"Witnesses:

"Ole Bergeson,

"Ole S. Neste."

"The court also finds that said Larson paid all the debts of the estate (including legacy), amounting to \$313.63; that Simonson boarded with Larson during the winter and part of the summer before his death; and that said Larson has performed each and every act required of him by the said instrument. The court further finds that

on November 29, 1879, the plaintiff executed and delivered to said Larson the following instrument in writing:

“November 28, 1879.

“Agreement is made between Hans Larson, Staale Simonson, Sister Marie Anne Evenson, and her heirs, that she shall get a team, harness, and wagon, free from encumbrance, and own it as her own property, of the estate that was given to Hans Larsen by Staale Simonson a few days ago, and that said Marie Anne Evenson agrees by several witnesses that she and her heirs shall never privately or by law make no more charges against the said estate except the fifty dollars mentioned in the will.

her

“Marie Anne X Evenson.”

mark.

“And that she received the team, harness, and wagon, and retained them. The court further finds that said Staale Simonson intended that the title to said land should vest in said Larson prior to his death; that the value of said premises so intended to be transferred to said Larson was in November, 1879, \$400, and that the defendant has succeeded to said Larson’s title.

“Upon the findings of fact the court concludes as matter of law: 1. That the execution and delivery of the instrument set out in finding No. 2, and the performance of the conditions subsequent therein contained by Hans Larson, operated, under the laws of Dakota territory, to vest, and did vest, the title to the property in dispute in Hans Larson; 2. That the plaintiff is estopped by her agreement set out in finding No. 11 from claiming or asserting any right, title, or interest in or to said premises; * * * 3. That the defendant is entitled to judgment of dismissal of the action, and for his costs.”

1. It is contended by the learned counsel for the appellant that the trial court erred in holding that the instrument signed by Simonson was sufficient to transfer the title of the property in controversy to Larson; and they insist that it was “either an unsuccessful attempt at making a will, an unfinished and incomplete contract, or a simple and pure proposal.” But we are of the opinion that the learned court below gave to the instrument the proper construction. While the document is informal, and is designated “a will,” the intention of Simonson to transfer the title of the property to Larson is, we think, clear from the language of the instrument, construed in connection with the other

facts proved. No particular form for a conveyance is prescribed by the statutes of this state other than a short form, which it is provided may be used: Comp. Laws, sec. 3347. But by section 3245 it is provided that "an estate in real property * * * can only be transferred * * * by an instrument in writing, subscribed by the party disposing of the same." This language clearly indicates that such an estate may be transferred by any instrument in writing, subscribed by the party, without seal (sec. 3246), without words of inheritance (sec. 3241), and without livery of seisin.

Mr. Chancellor Kent in his Commentaries, defining what a deed shall contain, says: "A deed consists of the names of the parties, the consideration for which the land was sold, the description of the subject granted; the quantity of interest conveyed, and, lastly, the conditions, reservations, and covenants, if there be any": 4 Kent's Commentaries, 460. Again, speaking of conveyances, he says: "I should presume under the New York statute the operative word of a conveyance is 'grant'; but, as other modes of conveyance operate equally as grants, any words showing an intention of the parties to convey would be sufficient": 4 Kent's Commentaries, 492. And in a footnote to same page the annotator says: "The word 'convey,' or the word 'assign,' or the word 'transfer,' would probably be sufficient. It is made the duty of the courts in the construction of every instrument conveying an estate to carry into effect the intent of the parties, and that intent may as certainly appear by these words as any other": *Lambert v. Smith*, 9 Or. 185; *McVey v. Green Bay etc. Ry. Co.*, 42 Wis. 532. And Chancellor Kent cites with approbation the statement of Lord Coke that, "if a deed of feoffment be without premises, * * * it is still a good deed if it gives the land to another and to his heirs without saying more, provided it be sealed and delivered, and be accompanied with livery": 4 Kent's Commentaries, 460, 461. As we have seen, in this state the failure to affix a seal does not invalidate a deed; neither does the failure to insert words of inheritance impair its validity as a deed, and no livery of seisin is necessary; and any words will be sufficient if they clearly manifest the intention to transfer the estate: *Doe v. Hines*, Busb. 343; 59 Am. Dec. 559; 5 Am. & Eng. Ency. of Law, 438; *Watters v. Bredin*, 70 Pa. St. 235; *Lynch v. Livingston*, 8 Barb. 463; *Field v. Columbet*, 4 Saw. 523. In the latter case Mr. Justice Field, in passing upon the sufficiency of a deed in which the only words of transfer used were "remise, release, and quitclaim," says: "Any words in a deed indicating an intention to transfer the estate, interest, or claim of the grantor will be sufficient as a conveyance, whether they

be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses." The instrument in controversy, although it uses the word "give" instead of "grant," comes, we think, within the letter and spirit of the rule as laid down in these authorities. While our statute uses the term "grant," and in the form given uses that term, yet to constitute a grant it is not indispensable that technical words be used. Any words that manifest the same intent will suffice: Anderson's Law Dictionary, 494; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 252; Barksdale v. Hairston, 81 Va. 765. But, giving to the instrument the most favorable construction for the appellant—that of a conveyance upon conditions subsequent—still we are of the opinion that the title was good in Larson. In such a conveyance the title passes to the grantee, subject to be divested upon a failure to perform the conditions. This is apparent from subdivision 5, section 3254, which provides: "Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant duly acknowledged." Of course no reconveyance would be necessary, unless the title passed by the original grant. The rule that the title passes in such conveyances is generally recognized: Towle v. Remsen, 70 N. Y. 303; 4 Kent's Commentaries, 125; 2 Blackstone's Commentaries, 154. In this case the court finds that Larson performed each and every part of said agreement; hence the conditions subsequent were fully performed, leaving in Larson a perfect title.

BERRY v. BILLINGS.

44 Maine, 416; 69 Am. Dec. 107. (1857)

* * * HATHAWAY, J. The respondents allege that they have the right to maintain their dam and flow the complainant's land, without compensation for damages. They derive their title, by *mesne* conveyances, from John Chandler, through Isaac Dexter and others, to whom Chandler conveyed by deed of April 23, 1832.

While Chandler owned the mills, and the complainant owned a part of lot No. 152, Chandler maintained a mill-dam where the respondents now maintain one, and overflowed the complainant's land, and settled

with him September 29, 1821, and paid him "full satisfaction for all past flowage on said land by said John Chandler's mill-dam," as expressed in the complainant's deed of that date, by which he sold "and conveyed to the said John Chandler full right and lawful authority to flow all the land on eighty acres of land, on lot numbered 152, in Winthrop aforesaid, being all of eighty acres off of the east end of said lot, excepting thirty acres set off to the widow, Elizabeth Hazeltine, as her thirds in the estate of Joseph Hazeltine. To have and to hold the same, with full right to flow to him, the said John Chandler, his heirs and assigns, forever, provided that he, the said Chandler, shall not flow higher than his present mill-dam will now flow." By this deed Chandler acquired a right to flow the complainant's land.

The complainant insists, in argument, that as there were no words of inheritance in the premises of his deed to Chandler, the words "heirs and assigns" in the *habendum* are void and of no effect, and that Chandler took only the right to flow during his life. The technical meaning of the word "premises" in a deed of conveyance is everything which precedes the *habendum*. The office of the *habendum* is to name the grantee, and to limit the certainty of the estate. If the premises in a deed are merely descriptive, and no particular estate be mentioned, then the *habendum* becomes efficient to declare the intention.

By legal construction, a deed of land to have and to hold, to B and his heirs, is good, although the grantee is not named in the premises: Inst. 6, 7, 298, 299, Hargrave's note, 33; Sumner v. Williams, 8 Mass. 174 (5 Am. Dec. 83); 4 Kent's Com. 468.

In the complainant's deed to Chandler the *habendum* is not repugnant to the premises, and it is therefore good and effectual: Vin. Abr., tit. Grant, K, sec. 1. Hence when Chandler conveyed his mills, etc., to Isaac Dexter and others by his deed of April 23, 1832, he owned the right to flow the complainant's land by virtue of his deed to him, and to his heirs and assigns forever, subject only to the proviso in the deed concerning the height of the flowing, and that right passed by Chandler's deed to Dexter and others as appurtenant to the mills, and thence by *mesne* conveyances to the respondents. The case is not different in principle from that of the owner of a mill and dam, and certain lands overflowed by the dam, who sells the mill with all its privileges and appurtenances. In which case the purchaser may continue the dam with the same head of water, without payment of damages to the owner of the land flowed: 4 Kent's Com. 467; Hathorn v. Stinson, 10 Me. 224 (25 Am. Dec. 228). Nor does it make any difference that the deed from Nathaniel Dexter does not contain the

words "privileges" and "appurtenances"; those words were not necessary: 2 Greenl. Cru. on Real Prop. 334, note; Kent v. Waite, 10 Pick. 141; Blake v. Clark, 6 Me. 436; Brown v. Thissell, 6 Cush. 257, cited by counsel in argument. * * *

ELLIOT v. SMALL.

35 Minn. 396; 59 Am. Rep. 329, 29 N. W. 158. (1886)

BERRY, J. The warranty deed involved in this case granted and conveyed "all the following described piece or parcel of land, * * * viz.: Beginning at the north-east corner of section thirty-four; * * * thence westerly, on the section-line, nine chains and ninety-six links; thence southerly five chains and two links; thence easterly nine chains and ninety-six links; thence northerly five chains and two links, to the place of beginning, containing five acres; * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract for a public street, and a strip thirty-three feet in width on the east side, which is now used and occupied as a public road and highway." The parallelogram of land thus described, nine chains and ninety-six links by five chains and two links, contains just five acres, the quantity specified in the deed. The description is precisely that which is appropriate to the conveyance of the entire five-acre tract; whereas, if the intention had been to exclude from the grant a strip thirty-three feet wide off of the south side of the five-acre tract, then inasmuch as the description is by distances, or dimensions of length and width, the more obvious, simple and natural way of exclusion would have been to describe the tract intended to be conveyed as being thirty-three feet narrower than the tract in fact described, that is to say, as being four chains and fifty-two links, instead of five chains two links in width.

It is difficult to see why, when he had adopted the plan of describing the property by its width in chains and links, the grantor should have specified a width greater than the actual width of the premise which he intended to convey, or why he should have embraced in the specified width thirty-three feet more than he intended to convey, simply for the purpose of taking it out again. The obvious and natural construction is that he meant to convey all that he described as a five-acre tract, nine chains ninety-six links long, by five chains two links wide.

This being the apparent intention of the grantor in his description of the five-acre tract, how is it affected by the so-called reservation? Certainly that does not operate to except from the tract the fee of the thirty-three feet strip on the south side, for this would be inconsistent with the intention mentioned (if not repugnant and therefore void), but to reserve an easement of right of way for a public street in and over the strip. As it did not except the fee, and the strip had never been used as a street, and no street had ever been laid out or opened upon it at the time of the grant, the so-called reservation was not, strictly speaking, an exception of anything, for an exception is of a part of the thing granted, and of something *in esse* at the time of the grant. A reservation is defined to be something newly created or reserved out of the thing granted, that was not *in esse* before, as for instance an easement. *Hurd v. Curtis*, 7 Metc. 94; *Winthrop v. Fairbanks*, 41 Me. 307; *Boone Real Prop.* 303. So that although the terms "exception" and "reservation" are often used indiscriminately, and the difference between them is in particular cases sometimes obscure and uncertain (*Bowen v. Conner*, 6 Cush. 132, and cases, *supra*; *Roberts v. Robertson*, 53 Vt. 690; s. c., 38 Am. Rep. 710), the so-called "reserving" of the thirty-three feet strip in this case, "for a public street," would be a reservation proper (if anything), as distinguished from an exception, properly so-called. And right here, and upon this point, it is important to observe that the strip is reserved "for a public street." If the grantor intended to except the fee of the strip from the grant, his intention was not expressed. The strip is "reserved" for a public street, and for nothing else. This does not require the exclusion of the fee of the strip from the grant, but only an easement; and upon the principle that a grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied.

Our construction of the deed then is that it passed to the grantee the fee of the whole of the five-acre tract. *Peck v. Smith*, 1 Conn. 103; s. c., 6 Am. Dec. 216; *Richardson v. Palmer*, 38 N. H. 212; *Tuttle v. Walker*, 46 Me. 280; *Kuhn v. Farnsworth*, 69 Me. 404; *Hays v. Askew*, 5 Jones Law, 63; *City of Cincinnati v. Newell*, 7 Ohio St. 37.

Whether the reservation was of no effect, because it was to a stranger, and not to the grantor, as held according to the old common law (*Hornbeck v. Westbrook*, 9 Johns. 73), or whether it is valid in favor of the public, as appears to be held or intimated in *Tuttle v. Walker* and *City of Cincinnati v. Newell*, *supra*, is a question with which the case at bar would appear to have no particular concern.

MOORE v. JORDAN.

65 Miss. 229; 7 Am. St. Rep. 641; 3 So. 737. (1887)

Bill by Mrs. Moore against her mother, Mrs. Jordan, for an accounting for the rents and profits of certain real estate. Cross-bill by Mrs. Jordan, asking that the conveyance of the same realty made by her to Mrs. Moore be set aside. The circumstances attending the execution of this conveyance, on which the defendant relied for relief, were as follows: One Williams, under whom all the parties claimed title, had been a surety on the bond of an official, who had become a defaulter. Williams died, and one Grayson became administrator of his estate. Mrs. Jordan was the daughter of Williams, and as such entitled to his estate. Grayson suggested to her to convey the property to her two daughters, Mrs. Grayson and Mrs. Moore, in order to avoid the payment of the amount due from Williams as surety, or at least to bring about a more favorable compromise than might otherwise be obtained; and he promised that a reconveyance should be made when the purpose of the conveyance had been accomplished. Mrs. Grayson reconveyed, as her husband had promised, but Mrs. Moore refused to be bound by his agreement. The contents of the conveyance, so far as material, are as follows: "I, M. A. Jordan, in consideration of the natural love and affection I have for A. A. Grayson and B. J. Moore, and also in consideration of the sum of one dollar in hand paid, have this day granted, bargained, and sold to the said A. A. Grayson and B. J. Moore (here describing the realty) to have and to hold to the said A. A. Grayson and B. J. Moore, their heirs and assigns forever. And I hereby covenant to and with the said A. A. Grayson and B. J. Moore to forever warrant and defend the title to the same free from the claims of all and every person or persons claiming the same whomsoever." The chancellor granted the relief sought by the cross-bill, and dismissed the original bill. Mrs. Moore thereupon appealed.

COOPER, C_J. The rule that a trust resulted to the grantor upon a voluntary conveyance, according to the common-law forms of feoffment, grant, fine, or recovery, etc., where no consideration is expressed or implied, and no trust is declared, and the circumstances rebut the presumption of a gift, seems not to apply to modern conveyances: 1 Perry on Trusts, 184.

Mr. Pomeroy thinks it would apply to such conveyances if the deed "simply contains words of grant or transfer, and does not recite nor imply any consideration, and does not, in the *habendum* clause or else-

where, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift": 2 Pomeroy's Eq. Jur., sec. 1035.

However this may be, it is evident that in the case before us no trust resulted to the grantor from the deed, for it recites a pecuniary consideration, though nominal: *Russ v. Mebius*, 16 Cal. 350; *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446; *Leman v. Whitley*, 4 Russ. 423; *Philbrook v. Delano*, 29 Me. 410; *Graves v. Graves*, 29 N. H. 129; *Groff v. Rohrer*, 35 Md. 327; 2 Story's Eq. Jur., sec. 1199. The *habendum* declares a use to the grantees, who are the children of the grantor, and there is a covenant of warranty: 2 Pomeroy's Eq. Jur., sec. 1035; *Gould v. Lynde*, 114 Mass. 366; *Bragg v. Geddes*, 93 Ill. 39; *Groff v. Rohrer*, 35 Md. 327; *Farrington v. Barr*, 36 N. H. 86; *Stucky v. Stucky*, 30 N. J. Eq. 546.

There is no pretense of a written declaration of trust by the grantees in favor of the grantor, and one by parol would be void: Code, sec. 1296.

There are therefore but two other grounds upon which the relief granted by the court below can be supported: 1. That the conveyance was procured by fraud or imposition practiced upon the grantor; 2. That the conveyance was made at the instance and procurement of one occupying a position of trust and influence, and that the grantees are volunteers.

On the first ground it is sufficient to say that the record is entirely free of evidence of any fraud against the grantor. The facts shown are, that she was the owner of the estate of her deceased father, one-half of which came to her by descent and distribution, and the other by conveyance from her mother, the widow. The intestate had been surety upon the official bond of an officer who had defaulted, and it was supposed by the administrator of the estate that a conveyance of the estate to third persons would be effectual to coerce a favorable compromise from the state, or would compel other sureties, who had made fraudulent conveyances of their estates to avoid liability on the bond, to contribute their proportions in payment of the default. At his suggestion and for these purposes the conveyance was made. Mrs. Moore took no part in the scheme other than to receive the conveyance, and the only fraud that can be imputed to her is, that she now declines to reconvey the property, as the administrator and the grantor in the deed thought she would do.

If this is such a fraud as will warrant the interposition of a court of chancery, the statute of frauds will be practically obliterated, since all parol contracts from which a trust would arise, if they were in writing,

will be enforced upon the ground that it is a fraud not to comply with them. * * *

MALARIN v. UNITED STATES.

1 Wall. (U. S.) 282; 17 L. Ed. 594. (1863)

MR. JUSTICE FIELD delivered the opinion of the court:

In his petition to the Board of Land Commissioners, Pacheco represented that in October, 1840, a grant of a tract of land, known by the name of Bolsa de San Felipe, was issued to him by Alverado, then Governor of the Department of California.

The board adjudged the grant to be valid, and confirmed the claim of the petitioner under it to the extent of two square leagues. On appeal, the District Court modified the decree of the board, affirming the validity of the title of Pacheco, but limiting it to one square league. From this latter decree the present appeal is taken by the executors of the claimant, he having died pending the proceedings. The United States were satisfied with the decree, and did not appeal. The case therefore stands in this court upon the question, whether the parties representing the claimant are entitled, under the grant to a confirmation of the title to one or two square leagues.

No question can be raised here upon the genuineness and authenticity of the grant to Pacheco. The Government having declined to appeal, the validity of the grant is not open for consideration.

In modifying the decree of the board, the District Court appears to have been influenced by the opinion that the grant had been fraudulently altered after it was issued, so as to purport to convey to the grantee two leagues, when it originally conveyed only one. It appears that preceding the term leagues the word one was originally written in the instrument, and was subsequently altered to the word two, or to be more accurate, an alteration was thus made in Spanish terms, corresponding with these English words. But, as the counsel of the appellants very justly observes, the grant could not be operative for any purpose except upon the conclusion that the alteration was made before its execution, or if subsequently made, that it was made with the sanction of the granting power. If valid therefore to pass one league, it must be held valid to pass the two leagues which it purports on its face to pass.

It is not necessary, however, to rest our decision upon this consideration. * * *

In the case under consideration the proofs remove all suspicion from the alteration, whatever may be the presumption of the law. The governor who issued the grant testifies substantially that the alteration was made by his direction, and that the grant was subsequently delivered or redelivered to the grantee. If this were the case, it is immaterial whether the alteration was made before the grant had received his signature or after it had been once delivered. The redelivery after the alteration, if such were the fact, was in legal effect a re-execution of the grant. That some discrepancy should exist in the statements of the governor at different times, with reference to a transaction which had occurred more than eighteen years before, is not surprising. His statements are consistent and positive to the effect that the alteration was made by his direction, and that the grant was delivered or redelivered afterwards, and they disagree only upon the point whether the alteration was made before or after the grant had been once delivered. The clerk in the office of the secretary, who attested the grant, corroborates the testimony of the governor, that the alteration was made by his direction. The juridical possession of the two leagues, delivered to the grantee soon after the execution of the grant, and the subsequent occupation by him of the premises until his death, a period of nearly twenty years, dissipates whatever doubt might otherwise exist as to the truth of the statement of the governor in this particular.

* * *

HOWARD v. NORTH.

5 Texas, 290; 51 Am. Dec. 769. (1849)

* * * Another objection to the deed is its vagueness in description of the premises. When the description of land in a deed is so indefinite that it cannot be identified with certainty, the deed becomes necessarily void, and conveys no title. But the objection, here, may be disposed of with the single remark that the description of the land sued for, as set forth in the plaintiff's petition, is almost identical with the description of the land in the sheriff's deed. No one can doubt that the premises described in the former are conveyed by the latter.

* * *

WILSON v. HUNTER.

14 Wisc. 683; 80 Am. Dec. 795. (1862)

* * * The mortgage described the premises conveyed as "the three-story brick building now occupied by them as a store," and "situated on land described as follows: Lot No. 1, in block No. 9, in the village of Whitewater." In point of fact, the store not only covered lot No. 1, but also the west two feet of lot No. 10 in that block. But there can be no doubt that the intent of the parties was to convey the store and all the land it stood upon. The land which is essential to the use of a building will pass by a conveyance of the building, if it appears that such was the intention of the parties: *Gibson v. Brockway*, 8 N. H. 465 (31 Am. Dec. 200); *Maddox v. Goddard*, 15 Me. 224 (33 Am. Dec. 604); *Moore v. Fletcher*, 16 Id. 66 (33 Am. Dec. 633); *Whitney v. Olney*, 3 Mason, 280. * * *

MADDOX v. GODDARD.

15 Maine, 218; 33 Am. Dec. 604. (1839)

* * * An objection is made to the title of the plaintiff. The deed from Stanley to Trafton conveyed one-fourth part of the mill and privilege. When a conveyance speaks of the mill only, without naming the privilege, it has been decided that any easement which has been used with the mill will pass: *Blake v. Clark*, 6 Greenl. 436. And a still more extended signification has been given to similar language in a devise: *Whitney v. Olney*, 3 Mason, 280. It was not unusual in our early history to find mill privileges conveyed without any exact bounds, and such deeds have been held to convey so much land as was necessary, and customarily used with the mill. The occupation by Durgin of the lot on which the mill stood, claiming title, was not inconsistent with the occupation at the same time by others of the mill privilege, which the case finds. The act of Maddox, in endeavoring to strengthen his title by obtaining a deed from Durgin, does not impair the title which he then had; and from the evidence in the case he appears to have had a good title to one-eighth of the mill and privilege, which he devised to the plaintiff during her widowhood and the minority of his son. It was the duty of the court so to decide and instruct the jury.

DEERY v. CRAY.

10 Wall. (U. S.) 263; 19 L. Ed. 887. (1869)

Eliza Deery brought ejectment October 12, 1863, to recover from one Cray an undivided fifth part of the southern half of Kent Fort Manor, an ancient manor in Kent County, Maryland. This manor was an irregularly shaped piece of land, whose longest direction is mainly north and south, surrounded entirely by water except on the northern line, which crosses a rather narrow neck of land. * * * If the manor were divided into two nearly equal parts by a line running from the western water-boundary to the eastern, all of the southern half would be surrounded by water except the short line separating it on the north from the other half.

The plaintiff having established on the trial a title to the whole of the manor in Samuel Lloyd Chew, one of her ancestors, further traced the title by descent to Lowman Chew, who died in 1862, childless and intestate, leaving five heirs of whom she is one. The defendants, on the other hand, introduced conveyances from Samuel A. Chew, the father of Lowman Chew, for a large part of the northern half of the manor, and, it was conceded that the plaintiff had no controversy with the tenant in possession of the remainder of the northern half not conveyed by Samuel A. Chew.

The controversy was thus limited to the southern half, of which, as already said, the plaintiff claimed an undivided fifth part, and to which she had shown a *prima facie* title.

To defeat this the defendants introduced a deed dated October 22d, 1787, from the said Samuel Lloyd Chew (from whom the plaintiff derived title) to his mother, Elizabeth Chew, which was asserted to be a conveyance of the fee of this south half of the manor.

The description of this land in this deed was in these words:

"All that moiety or half part of a tract of land called Kent Fort Manor, lying and being in Kent Island, in Queen Anne's County, being all that part of said tract of land which lies to the south westward of a line beginning on Northwest Creek and running an easterly course, agreeable to the plat of said land made by William Brown, of Anne Arundel County, in such manner as to comprehend one-half of the number of acres of the whole tract, the said line to be run and ascertained under the direction of John Thomas, Esquire, of Anne Arundel County."

The plaintiff—objecting to this deed that the description of the land

conveyed by it was so uncertain, as to render the deed void—excepted to the introduction of it, unless the plat which the deed referred to as made by Brown was produced and its lines shown. The court, however, permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by the defendants to the maintenance of the issue on their part.

The defendant then, in order to apply it, or in other words, show that this northern line had an existence, so as to enable one to determine what was the south half of the manor, introduced certain evidence as follows:

A map of the Kent Fort Manor, which was admitted to be part of a record of a chancery suit in Maryland, filed in 1802, and the location on the said map of Susanna Tait's moiety, admitted to be a correct location of the share of said manor assigned in said court to Susanna Tait, as sister, and one of the heirs of Arthur Bryan, in the partition of his real estate. This map had figures and lines on it showing a division of the manor into two equal parts of 1002½ acres each, and that the division was made by a straight line from a point on Northwest Creek, projecting far into the body of the tract, in a course a little south of east, to the eastern shore of the island.

Deeds showing conveyances of Elizabeth Chew (grantee in the deed whose admission in evidence we have already stated was objected to) to one T. M. Foreman, from Foreman to Philip Barton Key, and from Key to Arthur Bryan, of the same land, describing it either as the land on the said manor, purchased by Elizabeth Chew of her son Samuel, or as Elizabeth Chew's half part of the manor.

Proof by a witness over seventy years old that he knew Robert Tait, the husband of Susanna, and Kent Fort Manor, since he was eleven years old. That a fence then divided the north and south part of the manor, and said Tait held up to that fence. That after Samuel A. Chew, the father of Lowman Chew, came to live on the north half of the manor, he and Robert Tait changed the location of the fence, and that both recognized it as the boundary between them. And there was other testimony showing the holding under these parties by this line from that day to this.

Upon the deed thus admitted and the evidence just mentioned, the court below charged (the plaintiff excepting) that the defendants were entitled to the verdict if they should find that during the life of Samuel Lloyd Chew, or after his son, Samuel A. Chew, acquired the interest in the tract, and before his death, and more than twenty years

before suit brought, a division line or fence or boundary between the upper and lower moieties of the tract was established by the common consent, or with the common acquiescence of the said Samuel Lloyd, or Samuel A., and Elizabeth Chew, or those claiming under her, and that the said line, fence, or boundary was so established and recognized by and between the parties as and for the upper line of the lands intended to be conveyed to the said Elizabeth, by the said Samuel Lloyd, and had thenceforward and for more than twenty years before suit brought so continued to be, and that possession had ever since been continuously held by the parties possessing and claiming title on both sides of the line in recognition of and in conformity with said decision.

The introduction of the deed of 1787 from Samuel Lloyd Chew to Elizabeth Chew, and these instructions of the court on the effect of it and the title under it, made the principal point in the case; the plaintiff's position being that the deed ought not to have been admitted and that the charge was wrong. * * *

MR. JUSTICE MILLER delivered the opinion of the court.

The objection to the deed of 1787, from Samuel Lloyd Chew to his mother, Elizabeth Chew, is, that the description of the land conveyed is so uncertain as to render the deed void.

The plaintiff excepted to the introduction of this deed, unless the plat therein referred to as made by Brown was produced and its lines shown; but the court permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by defendants to the maintenance of the issue on their part.

Now, unless the deed is so fatally defective as that no subsequent competent evidence could make it good in point of description, the court did not exceed its just discretion in permitting it to be read. In other words, if the uncertainty was a patent ambiguity, an uncertainty which inhered in the essence of the description, rendering it incapable of being applied to the subject-matter, then the deed was void absolutely, and should not have been admitted. Otherwise it was well admitted.

But this does not seem to us to be the character of the instrument. All the boundaries given are well known and easily identified, except one. This one is to separate the southwestern half of the manor from the other half. The division is to be into moieties exactly equal in quantity. Now, it is entirely clear, that if you give a surveyor the number of acres of the whole tract, and the point on the Northwest

Creek where the division line is to commence, he can then determine mathematically the course, the distance, and the terminus of a straight line running an easterly direction which will divide the manor equally.

It may be conceded that if there was nothing referred to in the deed by which the commencement of this line, or any other part of it, could at the date of the deed have been fixed, that it would have presented a patent ambiguity. But if there was anything by which either the beginning or the end of the line could have been located, then the whole of it could have been located. On this point the deed seems sufficiently clear in two particulars. First, the line was to be run agreeable to the plat of land made by William Brown, of Anne Arundel County. Second, it was, with this aid, to be run under the direction of John Thomas, of said county. Now what is the meaning of this, fairly construed? It is that the grantor conveys one-half in quantity of the land. It is to be divided by a line running from the creek eastwardly, and there is a plat of this land made by William Brown, which shows this line, which is to be run out on the ground according to the plat, under the direction of John Thomas. The deed, therefore, refers perspicuously to the means which renders certain the description. "*Ambiguitas patens*," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

So here the deed on its face presented no apparent uncertainty. It is only when we come to apply it, and are unable to find or identify the plat made by Brown or the line run by Thomas, that there is any difficulty.

The cases relied on by counsel for the plaintiff to show that the courts of Maryland have established a different doctrine, are not inconsistent with what we have said.

In *Fenwick v. Floyd's Lesser*, the land was described as "part of Resurrection Manor, containing 251 acres more or less." Resurrection Manor was a large tract of 4000 acres, and the sheriff levied on and sold 251 acres of it, with no other description than that just stated. Nothing else was shown by which this quantity could be located or identified, and the description was clearly a patent ambiguity on which the levy and sale was rejected as evidence.

In *Thomas's Lessee v. Turvey*, three levies and execution sales were rejected, the schedules of which described the land as "part of Borough Hall, containing the supposed quantity of 130 acres of land, more or

less." Borough Hall was a tract of 500 acres, and there was nothing by which the location of the 130 acres could be shown, nor any evidence that it had ever been located.

In *Hammond's Lessee v. Norris*, the description in the deed was, "all these two parcels of land, being parts of a tract of land called Wood's Enclosure, and sold to said John Howard by Joseph Wood, one parcel containing 86 acres, the other 94 acres, as by deed duly made and recorded in Frederick County appears." The court overruled plaintiff's objection, and permitted the deed to be read in evidence, but, as it subsequently appeared that there was no such deed as that referred to on record in Frederick County, and as no other satisfactory proof was made of the location of these tracts within the larger tract of Wood's Enclosure, the court finally held that it conveyed no title.

That is just in accordance with the action of the court on this case in admitting the deed to be read in evidence, subject to the effect of it as to title, when all the evidence should be in.

This leads us next to inquire whether defendants have shown by satisfactory and competent evidence that this northern line had an existence, so as to enable us to determine what is the south half of the manor.

Upon this point it does not seem to us there can be any doubt, for though the plat of William Brown is not produced, nor is it proved expressly that the line was ever run under the direction of Mr. Thomas, yet there is as much evidence as can possibly be expected to be produced after the lapse of eighty years, that such a line was run, and that with such slight changes as the holders of the title on each side of it made by consent and for their mutual convenience, a fence has been standing along that line ever since.

And this does not depend solely upon parol evidence. The map in the chancery suit in Maryland, filed in 1802; the deeds produced, and the proof made by the ancient witness, with the other testimony produced, we think quite sufficient to show that the line mentioned in the deed of Samuel Lloyd Chew to his mother was run and established; that with the change made by Tate and Samuel A. Chew for convenience, it has remained the line to the present time, and that the parties claiming the north and south parts of the manor have recognized that fence for over thirty-five years as the line dividing their estates.

* * *

REED v. PROPRIETORS OF LOCKS AND CANALS.

8 How. (U. S.) 274; 12 L. Ed. 1077. (1850)

MR. JUSTICE GRIER delivered the opinion of the court.

The plaintiff in error was demandant below in a writ of entry, in which he claimed about eight acres of land in the city of Lowell.

The demandant claimed under Benjamin Melvin, who, it is admitted, was seized of the land in dispute, as part of a larger tract, in 1782. One undivided moiety of this tract Melvin held in right of his wife, and the other in his own right.

The tenants claimed under a mortgage given by Benjamin Melvin and wife to Jacob Kittredge, on the 27th day of April, 1782. In 1789, Kittredge entered under his mortgage, and leased the premises to Melvin. In 1796, Kittredge recovered the possession from Melvin on an action of ejectment, and had possession delivered to him by writ of *habere facias*.

From that time Kittredge and those claiming under him, now represented by the tenants or defendants in this action, claim to have had the peaceable possession of the demanded premises; and there is no evidence of any occupation by Melvin or his heirs, or claim thereto, till 1832, although they lived in the immediate neighborhood. On the trial below, the tenants relied on two grounds of defence, both of which they claim to have established by the evidence:—

1. That the demanded premises were included in the mortgage given by Melvin and wife to Kittredge in 1782.

2. That even if the land in controversy was not embraced within the deed of mortgage, yet that the entry of Kittredge in 1796, and the ouster of Melvin and wife, operated as a disseizin, and that by the uninterrupted and adverse possession of the tenants, and those under whom they claim, for more than thirty years before the entry of demandant, or those under whom he claims, his right of entry was barred by the statute of Massachusetts of 1786, ch. 13, sec. 4; which limits the right of any person under no disability to make an entry into lands, &c., to twenty years next after his right or title first descended or accrued, with a saving to *femes covert*, &c., of a right to make such entry at any time within ten years after the expiration of said twenty years, and not afterwards.

The court gave “full instructions to the jury” on the principles of law applicable to the complicated facts and somewhat contradictory testimony submitted to them on the trial; to certain portions of which

the demandant's counsel excepted, and has here assigned as error.

We shall proceed to examine them in their order.

I. "That if the jury believed from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

It is objected to this instruction, that it submits the construction of the deed to the jury, and permits them to conjecture the probable intention of the parties from facts and circumstances not contained in the deed. Whereas the intention of the parties is to be found in their deed alone, which it is the duty of the court to construe.

Taking this sentence of the charge as it stands, without reference to the facts of the case, it may be admitted that it affords some color to this objection. But when we look to the issue submitted to the jury, and the testimony exhibited by the record, the exception will be seen to be without foundation.

It is true, that it was the duty of the court to give a construction to the deed in question, so far as the intention of the parties could be elicited therefrom, and we are bound to presume that, in the "full instructions" which the record states were "given to the jury," and not contained in the bill, because no objection was made to them, the court performed that duty correctly. But after all this is done, it is still a question of fact to be discovered from evidence *dehors* the deed, whether the lines, monuments, and boundaries called for include the premises in controversy or not. A deed may be vague, ambiguous, and uncertain in its description of boundary; and even when it carefully sets forth the lines and monuments, disputes often occur as to where those lines and monuments are situated on the ground; and it necessarily becomes a fact for the jury to decide, whether the land in controversy is included therein, or, in other words, was intended by the parties so to be.

The mortgage referred to by the court describes the land as follows:—"A certain tract or parcel of land lying and being in Chelmsford, on Chelmsford Neck, so called, in said county of Middlesex containing by estimation one hundred acres, be the same more or less, lying altogether in one piece without any division, except only one county bridle-road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased."

The description of the land conveyed by this deed is of the most

vague and indefinite character ; it sets forth no monuments to indicate the line which divides it from the remainder of the tract owned by the mortgagor, and not intended to be included in the deed.

Hence, the demandant, in order to show what land was intended by the parties to be included, produced witnesses to prove the existence in former times of another "bridle-road," which he contended was the southern boundary of the mortgaged land, because a hundred acres lay north of this road, and the land was described as intersected but by "one county bridle-road," which ran through the northerly part of the farm. He produced a witness, also, to prove that Kittredge the grantee, had pointed out a certain monument near this road as marking his boundary.

The tenants contended, that the deed was uncertain as to quantity, and did not call for the road as its southern boundary. They also gave evidence to show the actual practical location by the parties of the land included in the mortgage, as early as 1789, which included the eight acres in controversy. For this purpose they produced the leases from Kittredge to Melvin, the mortgagor, dated in 1789 and 1793, and subsequently to the other tenants of Kittredge, setting forth courses and distances which included the demanded premises, as they contended, and proved by witnesses a possession held accordingly since 1796.

It cannot be doubted, that where a deed is indefinite, uncertain, or ambiguous in the description of the boundaries of the land conveyed, the construction given by the parties themselves, as shown by their acts and admissions is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.

From this view of the case, as exhibited by the record, it clearly appears that the question, whether the demanded premises were included within the limits of the mortgage, or intended so to be, was submitted by the parties, and by the nature of the case, to the jury ; and that, in order to a correct decision of the issue, the jury should be instructed to weigh the testimony as to the "monuments, length of lines, and quantities, actual occupation, &c.," and decide according to the weight of evidence. And such is the meaning, and no more, of the

language of the court now under consideration. We can perceive no error in it. * * *

HOWE v. BASS.

2 Mass. 380; 3 Am. Dec. 59. (1807)

Writ of entry to recover seisin and possession of certain land. The cause now came before the court on a motion for a new trial on the ground of misdirection of the jury. The following facts appeared in evidence. On the twenty-first of January, 1708, Robert Calef and wife conveyed to Israel Howe a tract of land in Boston, described as bounded forty-five feet on Orange street; on the tenth of October following, Joseph Simpson and wife conveyed to Howe a tract of land adjoining that before mentioned, and being twenty feet on Orange street. Israel Howe died seised of both parcels, and from him they descended to Elizabeth Gilman, who becoming *non compos*, Joseph Howe, as her guardian, entered and took the profits until about the year 1775. On the fifth of June, 1778, Joseph Howe, being duly authorized thereto, conveyed by deed to the defendant Bass a piece of land on Orange street, described as bounded on one side by the land of the heirs of Hannah Kent, and on the other side by land of the heirs of Joseph Veasie, and measuring forty-five feet. By the plan used in the case, the land bounded by the property of the heirs of Kent and Veasie measured sixty-five feet.

The demandants, who claimed as the heirs of Elizabeth Gilman, offered to show that the deed to Bass was intended to pass the land conveyed by Calef and wife, to Howe. This the judge rejected, and directed the jury that, for the purpose of ascertaining the quantity of land conveyed, fixed monuments should govern, although the actual measurement did not agree with the extent stated in the deed. Verdict was given for the defendant for the tract containing sixty-five feet by actual measurement.

Amory and Otis, for the demandants, in support of their motion for a new trial, contended that they ought to have been permitted to introduce evidence to show that a tract other than that found by the jury, was intended to be conveyed; and endeavored to make a distinction between one selling under a naked authority and the owner of land.

Gray, for the defendant, was stopped by the court,

PARKER, J. Being satisfied with the opinion I gave on the trial, I see no reason for sending the cause again to a jury. There is no rule of construction more established than this, that where a deed describes land by its admeasurement, and at the same time, by known and visible monuments, these latter shall govern. And the rule is bottomed on the soundest reason. There may be mistakes in measuring land, but there can be none in monuments. When a party is about purchasing land, he naturally estimates its quantity, and of course its value, by the fences which inclose it, or by other fixed monuments which mark its boundaries, and he purchases accordingly.

The jury were therefore instructed by me that, as the land contained within the monuments mentioned in the deed in question was all which had belonged to Elizabeth Gilman, the ward of the grantor, the construction of that deed should be, that it conveyed all her land. There was a case lately determined in the supreme court of New York, in which this principle is recognized and settled: *Man v. Pearson*, 2 Johns. 37.

SEWALL, J. I take the general rule to be that deeds and other instruments in writing are to be construed by themselves, except only when they contain a latent ambiguity. In the deed in question there is nothing ambiguous. Where monuments and admeasurements are both mentioned in the description of land conveyed, the purchaser must hold by the boundaries given by the monuments. I have known this question frequently agitated, and it has uniformly been so settled. It would have been improper to have gone into the inquiry respecting the title-deed handed to the scrivener. The direction of the judge on the trial appears to me to have been proper in every instance, and I see no reason for granting another trial on the ground disclosed.

SEDGWICK, J. Two questions might have arisen in this cause, viz.: whether the guardian pursued the authority vested in him, and which of the descriptions of the land conveyed by his deed is to prevail. But the first of these questions having been prevented by an agreement of the parties filed in the cause, by which we are to take it for granted that the authority was strictly pursued, the deed remains to be construed in the same manner as if it was a conveyance in the grantor's own right. In the construction of a deed we are never to go out of the deed itself, unless there be contained in it some latent ambiguity, or a reference to some extraneous circumstances. The only object of inquiry out of the deed in question is, what is Veasie's land? That being found, the deed must be construed by itself. It has been so long and invariably held in this country that in case of a variance in the de-

scription of land, between monuments and the length of lines, the former are to govern, that the rule cannot now be shaken; and from the application of this rule to the present case, it follows that the land conveyed by Howe to Bass, must adjoin the land of Veasie's heirs the whole length of one of its sides. I am therefore of opinion that the direction of the judge was right, and that there ought to be no new trial.

New trial refused.

WHITE et al. v. LUNING.

93 U. S. 514; 23 L. Ed. 938. (1876)

MR. JUSTICE DAVIS delivered the opinion of the court.

This is the case of a mortgagor unable to pay his debt, and getting it satisfied by a judicial sale of the mortgaged premises, who, on the ground that no title passed by reason of misdescription in the deed of the sheriff, seeks to prevent his creditor, who purchased them, from recovering possession. And this, too, when, if there be any misdescription, it was presumably caused by him, as they were offered for sale in parcels, by his direction and for his advantage. As the court does not find that the descriptive errors misled any person, or caused any sacrifice of the property, the presumption is, that no one was injured, and that the property brought a full price. Obviously, therefore, there are no merits in this defence. It rests alone on the idea that sheriffs' deeds and ordinary deeds *inter partes* are subject to different rules of construction. In regard, however, to the description of the property conveyed, the rules are the same, whether the deed be made by a party in his own right, or by an officer of the court. The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish. Is this deed void for uncertainty of description, or can the property intended to be conveyed be reasonably located by means of that description? The court below located it by adopting, except in one instance, the calls for courses and distances, and rejecting as false and repugnant certain calls for known objects. It is true, that, as a general rule, monuments, natural or artificial, re-

ferred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance.

Greenleaf, in his *Treatise on Evidence* (vol. 1, sect. 301), in speaking on this subject, in effect says, that where the description in the deed is true in part, but not true in every particular, so much of it as is false is rejected; and the instrument will take effect if a sufficient description remains to ascertain its application. Applying this rule to the subject-matter of this deed, we do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass the title to the land. The court below found, among other things, that if the courses and distances, being the field-notes of the survey, are followed from the point of beginning, changing east into west in the last course, the lines would, by closing, embrace the tract of land sued for, and correspond with all the other calls and monuments mentioned in the deed, except that there would be a departure at nearly right angles from the partition fence at the beginning of the call N. $47\frac{1}{2}^{\circ}$ E. 127 chains, and the lines would not extend to, nor in any manner correspond with, the north boundary of the rancho Sal Si Puedes. There are, therefore, three descriptive errors, which, if removed from the deed, would harmonize all other particulars in it, and leave enough words of description to identify the demanded premises.

These errors will be noticed in the order stated by the court. The deed closes with these words "and thence S. 41° 37' E. 17.32 chains to the place of beginning." This distance was correct, and so, except in one particular, was the course. It should have been west instead of east. To follow the course as given would manifestly not close the lines of the survey; and as, other things being equal, boundaries prevail over courses, the court rejected the latter and adopted the former as the true description in this particular. This was so obviously right, that further comment is unnecessary.

The next error relates to the "fence along the line of partition."

There is a call for this fence as a boundary during the running of seven courses; but it is plainly a false call, after the sixth course has been run, for the seventh course departs at nearly right angles from the line of the fence, and if this course be rejected and the call for the

fence retained, none of the other calls in the deed can be complied with, and the instrument is wholly unintelligible. On the contrary, if this course be accepted as the true description, and the call for the fence be discarded at the termination of the sixth course, there is no difficulty of harmonizing the other parts of the deed, with the exception of the northern boundary, and the difficulty there, we think, can be easily removed. It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for the course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses, and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant. This applies with equal if not greater force to the last and main error in this deed. Adopting the seventh course as the true description, the calls in the deed proceed as follows: "N. $47\frac{1}{2}^{\circ}$ E. 127 chains to the north boundary of the rancho Sal Si Puedes on the mountains, thence along said north boundary the following courses," &c.

The calls for these boundaries are equally false and mistaken with the call for continuing the line along the partition fence, as is clearly shown in the findings of fact by the court below. There are two ranges of mountains in the direction of the course N. $47\frac{1}{2}^{\circ}$ E. The summit of the first range is the northerly boundary line between the counties of Santa Cruz and Santa Clara, and both the summit and county line are about the distance of 127 chains from the point in the partition fence where the course N. $47\frac{1}{2}^{\circ}$ E. begins.

There is another range of mountains in the same northerly direction, in the county of Santa Clara, about three-quarters of a mile beyond the summit of the first range, and the northerly boundary of the rancho Sal Si Puedes is on this range of mountains.

The calls for courses and distances run along the summit of the first range, and do not apply to the second. Besides this, if the summit of the first be treated as the boundary intended to be called for, all other calls, monuments, courses, and distances in the deed completely harmonize, except the two descriptive errors which have already been corrected, and the lines enclose a tract of the precise number of acres sued for, lying wholly within the county of Santa Cruz. But if the call for "the north boundary of the rancho" be retained as the true description, there is not only conflict with all the remaining courses and distances,

but all the subsequent monuments mentioned in the deed, and the lines would not enclose the land in controversy, nor, indeed, any other. With all these facts to rest upon, is not the conclusion irresistible, that the words of the call at the end of the course N. $47\frac{1}{2}^{\circ}$ E. 127 chains—to wit, “the north boundary of the rancho Sal Si Puedes on the mountains,” and “along said boundary the following courses”—were mistakenly inserted, and should be rejected? Rejecting them, with the other particulars we have named, from the deed as false and inconsistent with the other parts of the description which are true, and of themselves sufficient to make a complete instrument, we are able to give effect to this judicial sale, according to the plain and manifest meaning of the officer who had it in charge.

It is rare, where so many field-notes of the survey of an irregularly shaped tract of land are incorporated in a deed, that there are so few mistakes. The courses and distances in this deed are numerous, and are all correct, except the last; and there the only error is in the course, which is easily corrected, as the call is for the post where the survey begins. And these courses and distances enclose the identical land in dispute. In such a case, it would be wrong to let two false boundaries stand in order to defeat a conveyance.

It is proper to remark that a map will accompany the report of this case, so as to make this opinion intelligible.

Judgment affirmed.

DOE ex dem. PHILLIPS' HEIRS v. PORTER.

3 *Arkansas*, 18; 36 *Am. Dec.* 448. (1840)

* * * LACY, J. The question now submitted for adjudication lies within a very narrow compass. It is, nevertheless, a question of considerable magnitude and interest, and one of no ordinary difficulty. Here we have given to the whole subject, and to every part of it, a most patient and full investigation. Both parties claim title to the land in controversy, under Sylvanus Phillips; the lessors of the plaintiff, as his legal heirs and representatives; the defendant in the action, as a purchaser, for a valuable consideration, from his immediate grantees. The law was adjudged below in favor of the appellee upon an agreed case. That judgment is now brought before the court by appeal for revision and correction.

The whole case turns upon the construction of the deed from Sylvanus Phillips to Austin Kendrick and Arnold Fisher, bearing date the first day of October, 1830; and the question now to be decided is, what number of acres does that deed convey? The deed embraces a great variety of clauses, conveying different tracts of land, and it uses the same terms of description and limitation in regard to them all. It first states the number of acres contained in each tract, and it afterwards refers to and recites the particular patent and grant under which Phillips derived title. The words of the deed are: "The party of the first part have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the party of the second part, and to their heirs and assigns forever, the following described tract, containing three hundred and sixty-six acres of land, being part of a six hundred and forty acre tract originally owned by Patrick Cassidy, and confirmed to William Russell under Patrick Cassidy, and patented by the president of the United States to William Russell and his heirs on the twenty-sixth day of March, 1824, which said tract of land was conveyed by William Russell to Sylvanus Phillips by deed bearing date the thirteenth day of July, 1825, situate in the county of Phillips and territory of Arkansas, adjacent the town of Helena."

It is conceded on all hands that the true construction of this deed will determine the rights of the parties to this suit. If the deed conveys three hundred and sixty-six acres to the grantee, then the law arising upon the agreed case is unquestionably for the defendant. But on the contrary, if it only conveys three hundred and fifty-eight acres of land, the exact quantity or number of acres included in Russell's deed to Phillips of the thirteenth of July, A. D. 1825, then it is evident that the lessors of the plaintiff are entitled to a recovery of the premises in question. The construction of the grant above quoted has been discussed with much ability and learning by the respective counsel engaged in the cause, and we have derived no inconsiderable aid and assistance in the formation of our opinion from their logical and demonstrative arguments. In the construction of deeds, says Lord Mansfield, the rules applicable to such instruments are accurately laid down and defined by all the authorities, and they rest for their foundation and support upon reason, justice, law, and common sense. We shall, in the present instance, only state a few of them, and such as we deem to have a direct bearing on the case under consideration.

1. All deeds shall be construed favorably and as near the intention of the parties as possible, consistent with the rules of law: 4 Cru. Dig. 202; *Bridge v. Wellington*, 1 Mass. 219; *Worthington et al. v. Hylyer*

et al., 4 Id. 202; *Ludlow v. Myers*, 3 Johns, 388; *Troop et al. v. Blodgett*, 16 Id. 172. 2. The construction ought to be put on the entire deed and every part of it. For the whole deed ought to stand together, if practicable, and every sentence and word of it be made to operate and take effect: 4 Cru. Dig. 203, sec. 5, and authorities above cited; P. Wms. 497; *Vaugh.* 167. 3. If two clauses in a deed stand in irreconcilable contradiction to each other, the first clause shall prevail, and the latter shall be regarded as inoperative: 4 Cow. 248; *Mard.* 94; 6 Wood. 107; 4 Com. Dig., tit. *Fait.* 4. The law will construe that part of a deed to precede which ought to take precedence, no matter in what part of the instrument it may be found: 6 Rep. 38b; *Cromwell v. Grumsden*, 1 Ld. Raym. 335; 10 Rep. 8; *Bulst.* 282. 5. All deeds shall be taken most strongly against the grantor. For the principle of self-interest will make men sufficiently careful not to prejudice themselves, or their rights, by using words or terms of too general or extensive a signification: 4 Com. Dig., tit. *Fait.* 4 Cru., p. 203, sec. 13; 8 Johns. 394; 16 Id. 172; *Adams v. Frothingham*, 3 Mass. 352 (3 Am. Dec. 151); *Watson et al. v. Boylston*, 6 Id. 411. These rules are now regarded as maxims in the science of the law, and they are perfectly conclusive of the points to which they apply.

In all conveyances the grantor must describe the thing granted with sufficient certainty to ascertain its identity. And if he fails to do so, the grantee takes nothing, by reason of the uncertainty of the grant; for there being nothing for the deed to operate upon, of course nothing passes by it.

The most general and usual terms of description employed in deeds to ascertain the thing granted, are, first, quantity; second, course and distance; and third, artificial or natural objects and monuments. And whenever a question arises in regard to description, the law selects those terms or objects which are most certain and material; and they are declared to govern in the construction of the deed. Upon this principle it is held that quantity must yield to course and distance, and that course and distance must give way to artificial and natural objects. These plain and salutary principles are fully sustained by all the authorities, as a reference to them will fully show: *Williams v. Watts*, 6 Cranch, 148; *Shipp et al. v. Miller's Heirs*, 2 Wheat. 316; *Jackson v. Barringer*, 15 Johns. 471; *Powell v. Clark*, 5 Mass. 355 (4 Am. Dec. 67); *Jackson v. Hubble*, 1 Cow. 617. In *Jackson v. Moore*, 6 Id. 717, it is declared that not only course and distance must yield to natural and artificial objects, but quantity, being the least part of description, must yield to boundaries or numbers, if they do not agree.

And in *Mann v. Pearson*, 2 Johns. 40, and in *Jackson v. Barringer*, 15 Id. 472, it is laid down to be a well-settled rule, that where a piece of land is conveyed by metes and bounds, or any other certain description, that will control the quantity, although not correctly stated in the deed, be the same, more or less. And the example put by way of illustration is, that if a man lease to another all his meadows in D. and S., containing ten acres, when, in truth, they contain twenty acres, all shall pass: *Jackson v. Wilkinson*, 17 Id. 147. In *Powell v. Clark*, 5 Mass. 356 (4 Am. Dec. 67), the rule is thus stated: "In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial whether any or what quantity is expressed; for the description by the boundaries is conclusive." "And when the quantity is mentioned, in addition to a description of the boundaries, without any express covenant that the land contains that quantity, the whole must be considered as description."

It is a general rule, "if there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." But when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every part of the description." Thus, if a man grant all his estate in his own occupation, and in the town L., no estate will pass, but what is in his own occupation and in that particular town. The description of the tenements granted must, in such a case, comprehend all the several particulars and circumstances named, otherwise the grant will be void: 4 Com. Dig., Fait, R. 3; *Doughty's case*; *Jackson v. Clark*, 7 Johns 223; *Blange v. Gold*, Cro. Car. 447, 473; *Jackson v. Loomis*, 18 Johns 84. But if the thing described is sufficiently ascertained, it shall pass, though all the particular descriptions be not true. For example, if a man convey his house in D., which was in the possession of R. C., when in truth and in fact it was in the occupation of P. C., the grant nevertheless shall be good: *Roe v. Vaumer*, 5 East, 51. For it was sufficiently described by declaring that it was in the town of D.: Hob. 171; Bro. Abr., Grants, 92. Where there is error in the principal description of the thing intended to be granted, though there be no error in the addition, nothing will pass. Thus, says Lord Bacon, "if a person grants *tenementum suum* or *omnia tenementa sua* in the parish of St. B. without Oldgate, when, in truth, it is without Bishopgate, *tenura Gulielmi*, A., which is true, yet the grant will be void, because, that which sounds in denomination is false, which is

the more worthy, and that which sounds in addition is true, which is the less. And though the words in *tenura Gulielmi A.*, which is true, had been first placed, yet it had been all one:" 3 Rep. 9; Stukeley v. Butler, Hob. 171; Doddington's case, Co. Lit. 2, 32, 33.

Where lands are first described generally, and afterwards a particular description added, that will restrain and limit the general description. Thus, if a man grants all his lands in D., which he has by the gift and feoffment of J. S., nothing will pass, but the lands of the gift and feoffment of J. S.: 4 Com. Dig. 287; 4 Cru. 325; 1 Johns. Ch. 210; 4 Cru. 225; Com. Dig., Parole, A, 23; Bott v. Burnell, 11 Mass. 167; Worthington v. Hylyer, 4 Id. 205.

We will now proceed to construe the deed of Phillips to Kendrick and Fisher according to the principles here laid down and established. The deed does not create either an express or an implied covenant to convey an exact quantity of acres mentioned in the first clause of the sentence, unless the terms "one other tract of land containing three hundred and sixty-six acres," constitute such an agreement. Had the deed stopped here, there can be but little doubt that the grantor would have sold, and the grantees have taken the exact number of acres as designated by these general terms. This it has not done, but it proceeds to add other words of greater certainty, and of more particular description, limiting and restricting their general meaning. The grant declares the premises sold to be the "said tract of land which was conveyed by William Russell to Sylvanus Phillips, by deed bearing date the thirteenth of July, 1825." Then the land sold and conveyed to Kendrick and Fisher is the same identical tract purchased by Phillips from Russell by deed bearing date thirteenth day of July, A. D. 1825. Here, then, the land is first described by quantity, and afterwards by boundary. That being the fact, the deed in question falls precisely within the rule—that the quantity must yield to the boundary—because the latter description contains greater certainty and materiality. Again, a particular description cannot be limited by general expressions. In the present instance, there is a general description, and then follows a particular description of the thing conveyed; and where that is the case, and the two descriptions contradict each other, the particular description shall prevail. No one can doubt but that Russell's deed furnishes a more accurate and particular description of the land conveyed than the simple affirmation that the tract contains three hundred and sixty-six acres. Both parties fixed and agreed upon the metes and bounds of Russell's deed for the purpose of ascertaining the exact number of acres conveyed. For if this was not the case, why did they

refer to that deed, and recite it in the grant? By incorporating it into their agreement, they made it a part of their covenant, and constituted it the governing consideration of their contract. It is no answer to this argument to say that Russell's deed to Phillips lacked certainty in description, and therefore its recital in Phillips' deed to Kendrick and Fisher cannot render that certain which is in itself vague and doubtful. It is true that the deed conveys three hundred and thirty-five town lots, a fraction of eighteen acres, and three hundred and forty acres. The deed recited contains sufficient certainty to ascertain the quantity conveyed. The town lots are specifically described, and so are the eighteen-acre tract and the three hundred and forty-acre tract. How then can the deed be said to want certainty in description? The two tracts of eighteen acres and three hundred and forty acres do not amount to the three hundred and sixty-six acres, but only to three hundred and fifty-eight acres. Russell's deed therefore only conveys three hundred and fifty-eight acres, and that being the case, the fraction of three and eighty-two hundredths acres cannot be included within the grant made by Phillips to Kendrick and Fisher of October 1, 1830.

* * *

HUMPHREYS v. McKISSOCK.

140 U. S. 304; 35 L. Ed. 473; 11 Sup. Ct. 779. (1891)

FIELD, J. The commissioner in his report committed a manifest error in holding that the Wabash Company possessed any interest in the property of the elevator company. The facts found by him as to the organization of the latter, the subscription to its stock, the construction of the elevator, and its lease to others, show beyond controversy the independent existence of that corporation, and that the railway company had no specific interest in its elevator or other property which it could mortgage. It was a mere stockholder in the elevator company. If there had been any doubt on this point from the evidence before that officer, on which he found the facts stated, it must have been removed by the stipulation of the parties. The court below therefore erred in confirming the commissioner's report in that particular, and entering a decree that Humphreys and Tutt, as receivers of the Wabash Company, execute and deliver to the petitioner, McKissock, an assignment of an interest supposed to be held by it, or by them as such receivers,

in the Union elevator. That railway company had no interest which it could assign. The building belonged to the Union Elevator Company; and the railway company was entitled, by its subscription, when paid, only to a certain proportion of its stock. Both the commissioner and the court in confirming his report and entering the decree mentioned seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith v. Hurd*, 12 Metc. (Mass.) 385, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the chief justice: “The individual members of a corporation, whether they should all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.”

The commissioner also committed a manifest error in his report in holding that the elevator was a common appurtenance to the railroads of the several companies having the stock of the elevator company, and that one-sixth interest therein was an appurtenance to the railroad of the Wabash Company. It is difficult to understand the course of reasoning by which a certificate of stock in an independent corporation can be an appurtenance to a railroad. If stock in the company in question could be considered an appurtenance to a railroad, by the same rule stock in a bank, or in any other corporation, with which the railroad did business, might be so considered. But were we to consider the Wabash Company as possessing a separable legal interest in the

elevator, it would not be appurtenant to its railroad. That building is situated at some distance from the railroad—more than half a mile,—and is erected on land not belonging to that company, but leased from the Union Pacific Railway Company, and can only be reached by crossing the tracks of another company. Had the elevator been constructed upon property covered by the mortgage it might have been contended that it fell, to the extent of the one-sixth interest, under the mortgage, as one of the depots of the company. The term “depot” in the mortgage is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which, when received, is to be safely kept until forwarded by the cars of the company, or delivered to the owner or consignee. Such a building, whether existing at the time of the mortgage or constructed afterwards upon the property of the company covered by it, may pass under the mortgage as one of its depots, but will not pass as an appurtenance to the property previously existing. A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris v. Elliott*, 10 Pet. 25, 54; *Jackson v. Hathaway*, 15 Johns, 447, 455; *Linthicum v. Ray*, 9 Wall. 241. Of two parcels of land one can never be appurtenant to the other, for, though the possession of the one may add greatly to the benefit derived from the other, it is not an incident of the other, or essential to the possession of its title or use; one can be enjoyed independently of the other. As said by the court of appeals of New York in *Woodhull v. Rosenthal*, 61 N. Y. 390: “A thing ‘appurtenant’ is defined to be a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. It results from this definition that land can never be appurtenant to other land, or pass with it as belonging to it. All that can be reasonably claimed is that the word ‘appurtenances’ will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass unless it is necessary to the enjoyment of the thing granted.” Under the term “appurtenances,” as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company, and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of

a railway and what would be only convenient. *Bank v. Tennessee*, 104 U. S. 493, 496. The elevator in question was at all times under an independent management, and was used in the same manner as any other warehouse not on the premises of the railway company to which it sent cars for freight. The court therefore erred in confirming the report of the commissioner in the particular mentioned, and in passing its decree upon the assumption that the Wabash Company had a legal separate interest in the elevator, and that the mortgage attached to such interest. That company, as already stated, possessed only stock in the elevator company; and the ownership of stock in one company has never been adjudged to be an appurtenance to a line of railroad belonging to another company. * * *

SEC. 4. COVENANTS OF TITLE.

WOODS v. NORTH AND JOHNSON.

6 Humphreys (Tenn.) 309; 44 Am. Dec. 312. (1845)

GREEN, J. This bill is filed to rescind a contract for the purchase of a tract of land. Theoderick North, the defendant, is one of the executors of the will of William North, his father, and at the sale of other property belonging to the estate, he offered for sale the tract of land in controversy representing that as executor, he had a right to sell and convey the same. The complainant became the purchaser, and the defendant, as executor, executed to him a deed of conveyance, with a covenant that he was seised, and had a good right, as executor as aforesaid, to convey. The will of William North confers no power on his executors to sell his land, and the deed of the defendant vests no title in the complainant. While this bill has been pending, a decree has been made for the sale of this land, in order for a division among the heirs of William North, and the defendant has become the purchaser at the sale, which has been made under that decree; and he now offers in his individual character, to make a good title to the complainant. The chancellor decreed a rescission of the contract, from which decree the defendant appealed.

We are of opinion there is no error in this decree. There is nothing in the clause of the will referred to in the pleadings from which the executor could possibly infer, that he had authority to sell the lands

of his testator. The very proposition to sell the land as executor, was a species of fraud. Persons who go to a public sale of a deceased person's estate, are not in the habit of scrutinizing the provisions of the will, to judge of the extent of the executor's power. They take it for granted, that he has good right to sell all the property he offers to the bidders. Where he thus offers the property for sale, it is a representation that he has a right to sell, and by reason of his situation he gains the confidence of bidders, who are deceived thereby, if he have no power to make the sale. Whether he intends corruptly to defraud the purchaser or not, the effect is the same; the bidder is deceived by the false representation, and ought to be relieved.

In this deed there is a covenant of seisin, in which the defendant asserts that he has a right to sell and convey this land as executor. Here is an express misrepresentation. The complainant had a right to bring his bill before he was evicted because of the covenant of seisin, on which a right of action arose the moment it was made. There is no reason for denying the complainant relief, and turning him over to his action at law on the covenants in the deed. The circumstances of imposition and fraud in the sale, are such as to sustain the jurisdiction of a court of equity: *Ingram v. Morgan*, 4 Humph. 66. The offer by the defendant of his own individual deed, by which a title acquired by him, personally, since the pendency of this suit, presents no ground for refusing the relief prayed in this bill. If the complainant were compelled to take this title, the price he agreed to give for the land would inure to the individual benefit of the defendant. He has purchased the land, and he is bound to his co-heirs only for the price he bid at the sale under the decrees before mentioned, while he would get all the benefit of the exorbitant price, it may be, which the complainant was to give. But if a party fraudulently sell, and convey an estate to which he has no title, the vendee who comes into equity to rescind the contract will not be compelled to take an after-acquired title from the vendor.

Note: In some states it is held that a covenant of seisin means seisin in its common law meaning and the fact that the possession is tortious does not involve a breach of the covenant. *Backus' Admrs. v. McCoy*, 3 Ohio 211; 17 Am. Dec. 585.

PETERS v. BOWMAN.

98 U. S. 56; 25 L. Ed. 91. (1878)

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a bill to enforce a lien upon real estate situate in Tunica County, in the State of Mississippi. Bowman owned the premises in fee-simple, and sold the undivided half to Bostick, and gave him a written contract, valid in equity, but not sufficient to pass the legal title.

Bostick died in 1868, possessed of property in Mississippi and Tennessee, and leaving a last will and testament.

By one of the clauses he appointed Gwinn his executor in Mississippi, and the appellee, Elliott, his executor in Tennessee.

By another clause he authorized the Mississippi executor to lease or cultivate the premises in question with Bowman, and finally under the circumstances named, "to join the said Bowman in making sale and title to the purchasers."

By another clause, after the payment of all legacies, debts, and expenses of administration, he gave to three persons, whom he named, and their successors, as trustees, the entire residue of his estate, "to be invested by them in a suitable site and buildings for a female academy" in Tennessee, and to be otherwise devoted to that institution.

Gwinn died in the lifetime of the testator.

On the 11th of January, 1869, the Probate Court of Tunica County granted "letters testamentary of the said last will and testament" to Elliott.

On the 25th of January, 1869, Elliott, describing himself as "executor of the last will and testament of J. Bostick, acting under the powers conferred by said will," and Bowman, united in a conveyance with full covenants to the four brothers, Jaquess, for the consideration of \$4,000, paid in cash, and the further sum of \$24,000, for which four notes were given by the vendees, each for the sum of \$6,000, and payable respectively on the first day of January in the years 1870, 1871, 1872, and 1873, with interest at the rate of six per cent per annum.

In reference to these notes the deed contains the following provision: "And to secure the payment of each and all of which said notes and interest an express lien is hereby retained by the parties of the first part upon the real estate and premises" in question.

The note maturing on the 1st of January, 1870, was paid by the Jaquess Brothers.

On the 26th of January, 1870, they sold and conveyed the premises to the appellant, Peters, for the consideration expressed in the deed of the sum of \$11,920 cash in hand, "and the assumption by the said Peters of the payment of three promissory notes for \$6,000, made by the first parties (Jaquess Brothers), and payable to Elliott and Bowman, for the same land herein conveyed."

The deed contains a covenant of the right to convey, of seisin, and of general warranty.

The covenant of good right to convey is synonymous with the covenant of seisin. The actual seisin of the grantor will support both, irrespective of his having an indefeasible title.

These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land. *Marston v. Hobbs*, 2 Mass. 432; *Breenby & Kellogg v. Wilcocks*, 1 Johns, (N. Y.) 2; *Hamilton v. Wilson*, 4 id. 72.

Peters put his co-defendants, General Chalmers and wife, in possession of the premises, under an arrangement whereby, when they should pay the balance of the purchase-money, he would convey to Mrs. Chalmers. Their possession has since continued, and has been undisturbed.

On the 8th of November, 1869, the same Probate Court granted letters of administration "upon the estate of J. Bostick, deceased, with the will of said Bostick annexed," to Elliott, upon his giving a sufficient bond and taking the oath prescribed by law, both of which were then done.

The original bill was filed on the 28th of February, 1873, to enforce the lien reserved in the deed of Elliott and Bowman to Jaquess Brothers, to secure the notes given for the purchase-money, the three last of which are wholly unpaid.

On the 31st of July, 1874, Elliott, to obviate objections made to the prior deed, executed a second deed to the Jaquess Brothers for the same premises. In this deed he describes himself as "administrator with the will annexed of said Bostwick," &c.

The deposition of Elliott shows that Bostick never had any title to the premises but what he derived from his contract with Bowman; that Bowman, after Bostick's death, insisted upon selling, and hence the sale to the Jaquess Brothers.

The court below decreed in favor of the complainants. Peters brought the case here for review.

There is no controversy about the leading facts of this case.

The questions presented are all questions of law. Bowman had the

legal title to the entire premises, and that title he conveyed to Jaquess Brothers, and they conveyed it to Peters. The deed of Elliott and Bowman contained all the usual covenants of title. The covenant of warranty ran with the land, and passed by assignment to Peters. The deed of the Jaquess Brothers produced that result. In the event of a failure of title, Peters can sue upon this covenant in either deed. *King v. Kerr's Adm'r.*, 5 Ohio, 154. When broken, it becomes a chose in action, but a subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction. *Id.* A sheriff's or a quitclaim deed will carry the covenant before its breach to the grantee. *White v. Whitney*, 3 Metc. (Mass.) 81; *Hunt v. Amidon*, 4 Hill (N. Y.), 345.

Where at the time of the conveyance with warranty there is adverse possession under a paramount title, such possession is regarded as eviction, and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie. *Noonan v. Lee*, 2 Black, 499; *Duval v. Craig*, 2 Wheat. 45. Here there is no adverse possession, and no eviction, actual or constructive; nor does it appear that suit has been threatened, or that an adverse claim has been set up by anyone. The possession and enjoyment of the property by General Chalmers and his wife have been the same as if their title were indisputable. It is insisted that the first deed of Elliott was fatally defective, because the letters from the Probate Court, under which he acted in making it, were issued to him as executor, and that both deeds were void, because under the will and the circumstances there was no authority to sell; and, lastly, because the *residuum* of the estate of the testator, including proceeds of the premises in question, was disposed of in a way forbidden by a law of the State of Mississippi.

We prefer to rest our judgment upon a ground independent of all these points, and which renders it unnecessary to examine them.

It is the settled law of this court that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase-money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor; and that no one claiming an adverse title can be permitted to bring it forward, and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties. *Noonan v. Lee*, *supra*; *Dial v. Reynolds*, 96 U. S. 340. In such cases, the vendee and those claiming under him must rely upon the covenants

of title in the deed of the vendor. They measure the rights and the remedy of the vendee; and if there are no such covenants, in the absence of fraud, he can have no redress. This doctrine was distinctly laid down in *Patton v. Taylor*, 7 How. 159, and was re-examined and affirmed in *Noonan v. Lee*. See also *Abbott v. Allen*, 2 Johns. (N. Y.) Ch. 519; *Corning v. Smith*, 6 N. Y. 82; *Beebe v. Swartwout*, 8 Ill. 162. That the vendor is insolvent or absent from the State, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle. *Hill and Wife v. Butler*, 6 Ohio St. 207; *Platt v. Gilchrist*, 3 Sandf. (N. Y.) 118; *Latham v. Morgan & Fitz*, 1 Smed. & M. (Miss.) Ch. 611.

The rule is founded in reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises, nor that the vendor shall be liable otherwise than according to his contract.

Where an adverse title is claimed, it cannot be litigated with binding effect, unless the claimant is before the court. We have shown that he cannot be made a party. One suit cannot thus be injected into another. Without his presence, the judgment or decree as to him would be a nullity. The law never does or permits a vain thing.

A title which cannot be made good otherwise may be made so by the lapse of time or the Statute of Limitations. Is the vendor to wait until this shall occur? and, in the meantime, can the vendee, or those claiming under him, remain in possession and enjoy all the fruits of the contract, and pay neither principal nor interest to the vendor?

Chancellor Kent well says, "It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual possession of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on a suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase-money, and of all proceedings at law to recover it." *Abbott v. Allen*, *supra*.

Decree affirmed.

HUYCK v. ANDREWS.

113 N. Y. 81; 10 Am. St. Rep. 432; 3 L. R. A. 789; 20 N. E. 581.
(1889)

EARL, J. In March, 1880, the defendant conveyed to Maria W. Huyck, plaintiff's intestate, by what is commonly known as a full covenant deed, certain land situate in the town of Coeymans, in the county of Albany, which, as described in the deed, contained the whole of Hawneycroix Creek within its boundaries. Prior thereto, Amos Briggs had received a deed of adjoining land on the east side of the creek, which conveyed to him, with the land, an easement, as follows: "The right to the use of the whole of the water of the said Hawneycroix kill or creek, also the right to erect and maintain a dam across said creek, and to connect same to the opposite bank thereof, at such place as the dam now is, and to extend the same, by an embankment or otherwise, from the bank at the water's edge to the high bank or hill west thereof; and the right, also, from time to time, to go onto and upon the land on the opposite side of said creek, for the purpose of erecting and maintaining said dam or dams, and of using thereof the land for that purpose."

Upon the land thus conveyed to Briggs there was a papermill, and there had been erected a dam across the creek to the westerly side thereof; and he and those under whom he held had used the waters of the creek for the purposes of that mill for many years. Subsequently to the conveyance to Mrs. Huyck, Briggs entered upon the land, and built an embankment westerly from the edge of the creek to the high bank upon her land. Afterward she brought this action for the breach of the covenants contained in her deed by the existence and use of the easement which Briggs had in the land conveyed to her. She recovered, and the defendant has appealed to reverse her judgment. He claims that the easement owned by Briggs was open, visible, and well known to Mrs. Huyck at the time she took her deed, and that therefore the covenants in the deed do not protect her against it. It is true that she knew that the paper-mill and dam across the creek were there, and that the waters of the creek had been used for many years for the purposes of the mill. But it does not appear that she knew the full extent of Brigg's easement, or that she had any knowledge whatever that he had any paramount right to the exclusive use of the waters of the creek, or to maintain his dam where it was located as

high as he wished. But even if she had such knowledge, that fact furnished no defense to this action.

The deed entitled her to a perfect title to all the land which it purported to convey, free from any encumbrances thereon, and it is no defense to her action that at the time she took it she knew of some encumbrance or some defect in the title. Proof of such knowledge would be quite important in an action brought by her grantor to reform the deed, but as a defense to an action upon the covenants contained in the deed, it is of no importance whatever. That the covenant against encumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this state, and there is no hint in any of them that knowledge by the grantee of the existence of the easement at the time of the conveyance makes any difference. An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. An encumbrance, within the terms of the covenant against encumbrances, is said to be "every right to or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance": *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 246; and the breach of such a covenant takes place at the instant the conveyance is made.

There is in this state one exception to the rule that the existence of an easement constitutes a breach of the covenant, against encumbrances, and that is in the case of a highway. It was held in *Whitbeck v. Cook*, 15 Johns, 483, 8 Am. Dec. 272, that it is not a breach of the covenants that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in this state. It was based upon the peculiar nature of highway easements, and the general understanding with reference to them. *Spencer, J.*, writing the opinion said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers.

If it could succeed, a flood-gate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements and the rule of that case has not been applied to any other. While there was not in the deed there under consideration any covenant against encumbrances, yet the *ratio decidendi* is equally applicable to such a covenant; and since that decision it has always been understood in this state that such a covenant is not broken by the existence of a highway.

In *McMullin v. Wooley*, 2 Lans. 394, it was held that the right to take water by means of a pipe laid beneath the ground from a spring on the premises conveyed constituted a breach of the covenant against encumbrances. In *Roberts v. Levy*, 3 Abb. Pr. N. S., 311, it was held that a covenant, entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected upon the lots should be set back a specified distance from the street on which the lots fronted, constituted an encumbrance upon the lots to which it applied; and if subsequently conveyed by deed containing the usual covenant against encumbrances, a breach of the latter covenant arises the instant the deed is executed. In *Rea v. Minkler*, 5 Lans. 196, it was held that the existence and use of a private right of way over the granted premises was a breach of warranty; and *Blake v. Everett*, 1 Allen, 248, *Russ v. Steel*, 40 Vt. 310, and *Wetherbee v. Bennett*, 2 Allen, 428, are to the same effect.

In *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, where the owner of land upon a stream conveyed the same with a covenant of quiet enjoyment, and subsequently an owner below, under and by virtue, of a paramount right, raised the height of a dam upon his land and thereby flooded the land conveyed, it was held that there was substantially an eviction and a breach of the covenant. In *Mitchell v. Warner*, 5 Conn. 497, it was held that a pre-existing right in a third person to take water from the land conveyed is a breach of a covenant against encumbrances. In *Morgan v. Smith*, 11 Ill. 194, it was held that an easement authorizing one to dam up and use the water of a branch running over the land conveyed, and to use the water of a spring upon it, is a breach of the covenant against encumbrances. In *Medler v. Hiatt*, 8 Ind. 171, there was a conveyance of land, with covenants against encumbrances, through which there was a stream of water, and at the time of the conveyance there was across the creek, a short distance below the land conveyed, a dam which

backed the stream up so as to overflow a large quantity thereof. The action was brought upon promissory notes given for the purchase price of the land. The defense set up was breach of covenant against encumbrances. To this defense the plaintiff replied, *inter alia*, that the defendant, when he purchased the land, knew of the existence of the dam and of the right to flow back the water; and to this reply the defendant demurred. The demurrer was overruled, and upon appeal the judgment upon the demurrer was reversed. The court said: "It is conceded that the action of the court in overruling the demurrer raises the main question in the case, and in support of that ruling it is insisted that, as the appellant received a deed for the lands with full notice of the dam, and the right to continue it, the law presumes that he took the conveyance subject to the encumbrance. The rule of decision on this subject, as evinced by various authorities, is to some extent unsettled. None of the authorities, however, sustain the position that mere notice to the vendee, at the time he receives his deed, of an existing encumbrance excludes it from the operation of an express covenant against encumbrances. * * * The plaintiff's reply contains nothing from which a contract relative to the easement can be inferred. It is true, the defendant knew of the encumbrance, but mere notice of it does not indicate even an intent to relinquish any remedy he might have under the covenants in his deed." In *Hovey v. Newton*, 7 Pick. 29, the action was covenant upon a lease of water-works and buildings, with the whole control of the water in the pond, except the right which one Bangs had to take water in logs to his garden, and a similar right reserved to the lessor; and the court held that parol evidence was not admissible to prove that, in the intention of the parties to the lease, there was likewise an exception of the right which the county of Worcester had exercised for more than twenty years, of occasionally diverting part of the water for the purpose of cleaning the county jail, and which diversion was well known to the parties at the time of making the lease. In *Mohr v. Parmelee*, 11 Jones & S. 320, a party-wall was wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party-wall by the proprietor of the other by reason of a prior grant, and it was held that it constituted an encumbrance upon the land on which it stood; that when a title is encumbered by such an easement a right of action immediately accrues; and that whether the covenantee had or had not knowledge or notice of its existence is immaterial, both as regards his right of action and the question of damages. In 2 *Greenleaf on Evidence*, section 242, it is said: "A public highway over the land,

a claim of dower, a private right of way, a lien by judgment or by mortgage, or any other outstanding, elder, and better title is an encumbrance, the existence of which is a breach of this covenant. In these and the like cases it is the existence of the encumbrance which constitutes the right of action, irrespective of any knowledge on the part of the grantee or of any eviction of him." In 2 Dart on Vendors and Purchasers, 6th ed. 886, the following language is used: "Although the fact of the purchaser having notice of the defect cannot prevent the covenants for title from extending to it, since extrinsic evidence is inadmissible for the purpose of construing a deed, yet in an action to rectify the covenant, that fact can be used as the basis of an inference that it could not have been the intention of the parties that the covenant should include a defect of which both parties were aware. * * *

To support the contention of the appellant, his counsel has placed much reliance upon the cases of Kutz v. McCune, 22 Wis. 628, and Memmert v. McKeen, 112 Pa. St. 315. In Kutz v. McCune, *supra*, it was held that an easement obviously and notoriously affecting the physical condition of the land at the time of its sale is not embraced in the general covenant against encumbrances. In Memmert v. McKeen, *supra*, it was held that encumbrances are of two kinds: 1. Such as affect the title; and 2. Such as affect only the physical condition of the property; that where encumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude, imposed upon the land which is visible to the eye, and which affects, not the title, but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition, and with reference thereto. We do not yield assent to these authorities. They have no sanction in any of the cases decided in this state, and have no adequate foundation in principle or reason. They open to litigation, upon parol evidence, in every action for the breach of the covenant against encumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except

them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title or encumbrances upon the land; but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and encumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made between encumbrances which affect the title and those which affect merely the physical condition of the land conveyed is quite illusory and unsatisfactory. Easements not only affect the physical condition of the land, but they affect and impair the title. The owners of them have an interest in and dominion over the servient tenement which frequently may largely impair its usefulness and value. The rule contended for would operate very unjustly, and would be quite difficult to administer in many cases. In this case, while the grantee knew of the existence of the dam, and of some use of the water, she did not know of the right to extend the dam from the edge of the water to her high land on the west side of the creek; nor did she know of the right Briggs had to use the entire water of the stream.

We are therefore of opinion that Mrs. Huyck was entitled to the protection of the covenant against encumbrances. * * *

KUTZ v. McCUNE.

22 Wisc. 628; 99 Am. Dec. 85. (1868)

PAINÉ, J. The defendant conveyed to the plaintiff a tract of land by a deed containing the usual covenants of seisin and against encumbrances, without any exceptions to those covenants. At the time of the purchase, between thirty and forty acres of the land were flowed by a mill-pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question. This action was brought for a breach of the covenants of seisin and against encumbrances by reason of this existing right of flowing.

The circuit court instructed the jury that it made no difference whether the purchaser was fully aware of the situation of the property

at the time of purchasing, or not; and that the right of flowing constituted an encumbrance that occasioned a breach of the covenant, for which the defendant was liable. This, I think, was error. That such a right does not constitute a breach of the covenant of seisin, see Rawle on Covenants, 83, 142. It may have been an encumbrance. But there is a principle recognized by adjudged cases, and resting upon sound reason and policy, which holds that purchasers of property obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take it subject to such right without any express exceptions in the conveyance, and that the vendors are not liable on their covenants by reason of its existence. This principle has been applied in the case of a highway opened and in use upon the land at the time of the conveyance: Rawle on Covenants, 141 *et seq.*; *Scribner v. Holmes*, 16 Ind. 142.

This principle seems fully applicable to the present case. There is no material difference, so far as this question is concerned, between a public highway and a right of flowing the land by a mill-pond in actual existence upon it. In the case of the highway, the doctrine does not rest upon the fact that the right is in favor of the public, but that the easement is obvious and notorious in its character, and that therefore the purchaser must be presumed to have seen it, and to have fixed his price for the land with reference to its actual condition at the time. And certainly a mill-pond upon land is quite as notorious an object as a highway, and the reason for the presumption just suggested is quite as strong. The contrary doctrine has been held, in respect to highways, in Massachusetts and some of the other New England states; though in *Herrick v. Moore*, 19 Me. 313, the court seem to imply that if the highway had been actually opened and in use, and the plaintiff knew of its existence at the time of his purchase, their conclusion would have been different. But however that might have been, the weight of the argument is decidedly in favor of the rule held in Pennsylvania in *Patterson v. Arthurs*, 9 Watts, 152, and approved in *Whitbeck v. Cooks*, 15 Johns, 483 (8 Am. Dec. 272). And to hold that every highway, in open notorious use as such, upon land at the time of its conveyance, would constitute a ground of action for a breach of the covenant against encumbrances, unless specially excepted, would undoubtedly, in the language of Chief Justice Spencer, "open a floodgate of litigation" in this state as well as in New York.

There is another class of cases which strongly supports the same conclusion. The principle which they establish may be briefly stated in the language of the syllabus to *Seymour v. Lewis*, 13 N. J. Eq. 439

(78 Am. Dec. 180), as follows: "Where the owner of two tenements sells one of them, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains." The case cites a great number of authorities illustrating the rule. It was also in accordance with the French law, as shown in Washburn on Easements, 16, 17. And a very strong instance of its enforcement is found in the recent case of Harwood v. Benton, 32 Vt. 724. That was a case where the owner of a mill-pond and the surrounding lands conveyed a lot not bounded on the pond, but adjacent to it, and which was sometimes flowed, though not continuously. The deed contained the usual covenants, with no exceptions or reservations. Yet the court held that the vendor himself retained the right to flow the lot conveyed as it had been theretofore flowed, and was not liable on his covenants by reason of the existence of such right. According to that case, if the defendant here had himself owned the mill and dam which created the mill-pond, he would have retained the right to flow the land as it was flowed, and would not have been liable on the covenants. Can there be any stronger reason for holding him liable now? If the law, without any exception in the deed, will, from the presumed understanding of the parties, based upon the obvious condition of the property sold, imply a reservation in favor of the vendor, should it not equally imply one upon the same grounds when the continued existence of the right is of no benefit to the vendor?

True, there is a technical difference, which is alluded to in the case last cited. That is, that where both parcels of land are owned by the same person, the servitude imposed on a part in favor of the rest is not technically an easement, because no man can have an easement in his own land. But the implied reservation in his favor takes effect at the same instant with his covenants on the delivery of the deed, and then constitutes an easement in his favor, and consequently an encumbrance. And certainly there is no more ground for supposing that the purchaser in such case intends to take the property subject to such reserved right in favor of his vendor than there is, in the case where the property in whose favor the servitude is imposed is owned by a stranger, to suppose that he intended to take it subject to that. This class of decisions does not rest at all upon this technicality, but upon the broad, substantial grounds constituting the foundation of the former class. And the court in Vermont quotes from Gale and Whateley on Easements the following passage, which puts the vendor only on the same footing in this respect with other adjoining owners: "There

is no reason why a purchaser should not exercise the same degree of caution in ascertaining what easements his projected purchase is liable to in favor of his vendor as well as in favor of other adjoining owners." The substantial foundation for both classes of decisions is the strong, natural presumption that the parties sell on the one hand, and buy on the other, the property in its actual physical condition, and subject to such rights, either in favor of the vendor or others, as that physical condition obviously indicates, without any exceptions or reservations concerning them in the deed. So that the decisions that an existing highway in favor of the public, and a right of flowing the land conveyed by the vendor, as it was done at the time of the conveyance, do not constitute breaches of the covenant against encumbrances for which the vendor is liable, really rest upon the same principle.

The court below compared it to the case of a mortgage on the property sold known to the purchaser. But the two cases are essentially different. A mortgage does not affect the physical condition of the property at all. It is a mere incident to a debt of the vendor; and where the purchaser takes his covenant against encumbrances, there is no reasonable ground for supposing that he intended to have his land subsequently sold to pay the vendor's debt, or else to pay it himself. It is so different from the question that has been considered that there is really no comparison between them.

The judgment is reversed, and the cause remanded for a new trial.

Note: This case is inserted so that it may be contrasted with the case of *Huyck v. Andrews*, *supra*, p. 792.

BOSTWICK v. WILLIAMS.

36 Ill. 65; 85 Am. Dec. 385. (1864)

BRESE, J. It is a strong presumption that the note was given for the land, and in the absence of any proof to rebut it, the presumption must prevail.

The contract with the plaintiffs was, that on payment of the notes with the interest, they would execute and deliver to defendant a good and sufficient deed of general warranty for the premises, and the defendant was to take immediate possession of the same.

It is in proof that before suit brought, on the very day of its com-

mencement, plaintiffs presented the note to defendant for payment, and tendered him a warranty deed in the usual form, dated December 27, 1856, for the premises described in the contract, executed by them on the first day of July, 1862. The defendant replied to the demand and tender, that he had not the money, and was unable to pay the note.

It is in proof that on the first day of July, 1862, the plaintiffs were married men, and had been for some time previous.

The dower right of their wives was not released by this deed. The question then is, Did this furnish a sufficient excuse for the non-payment of the note?

We think not. The covenant was to make a general warranty deed, and nothing more. Such a deed was tendered, and the party was bound to accept it. Even if the covenant was to make such a deed free and clear of all encumbrances, it has been said by a respectable court that a possibility of dower is not, within the sense of such a covenant, an encumbrance, for that means a settled, fixed encumbrance: Per Story, J., in *Powell v. Monson and Brimfield Manufacturing Co.*, 3 Mason, 355.

As the plaintiffs undertook to make a deed with a covenant of general warranty only, it could not be broken until there was an actual eviction, or something equivalent to an eviction: *Beebe v. Swartwout*, 3 Gilm. 179. Such a covenant is usually treated as synonymous with a covenant for quiet enjoyment, since the same concurrence of circumstances is necessary to their breach; they equally possess the capacity of running with the land, and the rules as to the measure of damages are the same as to both: *Rawle on Covenants*, 196.

The covenant, as expressed in the obligation of the plaintiffs, amounts to no more than an engagement that it should bar the covenantors and their heirs from ever claiming the land, and that they and their heirs should undertake to defend it when assailed by a paramount title. We cannot find in the books any authority for the suggestion that a covenant of general warranty, by itself, includes a covenant against encumbrances, admitting an inchoate right of dower to be an encumbrance.

All the cases cited by appellant are cases in which the covenant against encumbrances was inserted in the deed, and can have no application to this case.

When the deed was tendered to defendant he did not then object that it contained no release of dower. Had he made that the objection, it might have been removed at once by procuring such release.

Making no objection to the deed on the ground now taken would

not perhaps preclude him, but being made we are of opinion the covenant of the plaintiffs was performed by them, and the defendant should receive the deed and pay the note. If, hereafter, the wives of plaintiffs should become widows, and claim and recover their dower in a mode by which the defendant may be injured, he will be able to obtain recompense on the covenants in his deed. It would be unjust to allow him to defeat the payment of the note on this bare possibility, and at the same time retain the possession and enjoyment of the land.

HODGES v. LATHAM.

98 N. C. 239; 2 Am. St. Rep. 333; 3 S. E. 495. (1887)

Action for breach of warranty. The plaintiff testified that he purchased the land in question from the defendant, and paid part of the purchase price; that he cultivated it for a time, and then rented it to one Mitchell; that he left the neighborhood for a few months, and upon his return found that Willis Cherry, who had married a daughter of C. C. Little, had got possession of the land. The court intimated that the jury should be instructed that the plaintiff could not recover, and thereupon the plaintiff submitted to a judgment of nonsuit, and appealed. Other facts appear from the opinion.

DAVIS, J. It was under and by virtue of the judgment in the special proceeding of D. H. Latham, administrator, etc., of C. C. Little v. Willis Cherry et al., that the land in question was conveyed to W. A. Blount by the defendant Latham, and the proceeds of the sale, or so much thereof, as was applicable to that purpose, applied in discharge of the balance of the purchase-money due upon the sale of the land made to C. C. Little in 1861. The paramount title was in the heirs of Little, claiming under the sale made to their ancestor in 1861, by the defendant Latham. He cannot be heard to say that their title was not good and paramount to that acquired by the plaintiff from him.

One of the heirs of Little had acquired possession in the manner stated in the case. Was that such an eviction, actual or constructive, as to entitle the plaintiff to recover upon the warranty in the deed from Latham to him? We think it was.

"The existence of a better title, with an actual possession under it, is of itself a breach of the covenant." The purchaser is not required to bring an unnecessary action, in which he must fail to recover the

possession: *Grist v. Hodges*, 3 Dev. 198; *Herrin v. McEntyre*, 1 Hawks. 410; *Duvall v. Craig*, 2 Wheat. 45.

If there had been no eviction by legal process, the burden of showing that there was a better or paramount title is upon the purchaser; and even then the mere existence of a superior title in another is not a breach of the covenant, but the purchaser need not be actually evicted by legal process. "It is enough that he has yielded possession to the rightful owner; or, the premises being vacant, that the rightful owner has taken possession": 3 Washburn on Real Property, 3d ed., 406.

In *Sprague v. Baker*, 17 Mass. 586, there was a valid prior encumbrance by mortgage, which, upon demand, the purchaser discharged. This was held to be such an eviction constructively as entitled him to recover upon the warranty. So in *Noonan v. Lee*, 2 Black, 507, it is said that an adverse possession by virtue of a paramount title is regarded as an eviction, and involves a breach of the covenant of warranty.

There was error, and the plaintiff is entitled to a new trial.

SUYDAM v. JONES.

10 *Wendell*, (N. Y.) 180; 25 *Am. Dec.* 552. (1833)

Actions for breach of covenants of warranty and quiet enjoyment. Plaintiff declared on the covenants in a certain deed from the defendant to one Sandford, who conveyed to the plaintiff; and alleged an eviction by one Rapelye, under a title derived neither from Sandford nor the defendant. Several special pleas were pleaded, setting forth, in substance, that Rapelye was the purchaser at a foreclosure sale under a mortgage given several years before the conveyance to Sandford; that the mortgage was recorded; that Sandford had actual notice of such mortgage, and agreed with the defendant to pay off the same as part of the consideration; and also that the covenants of warranty and of quiet enjoyment should not be considered to extend to the mortgage. Demurrer to these pleas, and joinder.

SUTHERLAND, J. The doctrine that a covenant of warranty runs with the land, and inures to the benefit of the assignee of the covenantee, who may bring an action for the breach of it in his own name against the original covenantor, is not questioned or denied. The only doubt upon this point which was ever entertained in this court was,

whether, when a covenantee conveys with warranty, his grantee, upon eviction, could sue the original warrantor, or whether his remedy was confined to his immediate covenant of indemnity. The latter opinion was expressed in *Kane v. Sanger*, 14 Johns. 89. But the whole subject was fully reviewed and considered in *Withy v. Mumford*, 5 Cow. 137, where the broad doctrine that the assignee may maintain an action against the original covenantor, whether the immediate conveyance to him was with or without warranty, was, upon a consideration and review of all the cases, fully established: Co. Lit. 384, b, 385, a; Cru. Dig. 452, 453; Cro. Eliz. 503; Shep. Touch. 198, tit. Warranty; 2 Mass. 460; *Booth v. Starr*, 1 Conn. 244 (6 Am. Dec. 233).

If the covenant passes to the assignee with the land, it cannot be affected by the equities existing between the original parties any more than the legal title to the land itself. A covenant under seal cannot be discharged by a parol agreement before breach: *Kaye v. Waghorn*, 1 Taunt. 427. The discharge must be by matter of as high a nature as that which created the debt or duty: *Preston v. Christmas*, 2 Wils. 86. This is universally true where the action is founded upon, or grows exclusively out of the deed or covenant: *Blake's case*, 6 Co. 43; *Alden v. Blague*, Cro. Jac. 99. In covenant, therefore, award with satisfaction before breach is bad, because the plea goes to the covenant itself, though after breach it may be good, for then it goes only in discharge of the damages, and not of the deed: *Snow v. Franklin*, Lutw. 108, in my ed. of 1708, cited in others as 1 Lutw. 358.

The principle that a written contract or instrument cannot be essentially varied by parol, seems also to be applicable to this case, and to exclude the defense. The covenant in the defendant's deed, it is conceded, embraces in its terms the mortgage, under and by virtue of which the plaintiff has been evicted. The defense is either that at the time of executing and delivering the deed, it was understood and agreed between the parties that the covenants should not extend to that mortgage, or that after the deed was executed and delivered the grantee agreed that it should not embrace the mortgage, and *quoad hoc* discharge the covenant.

In the first point of view, the objection to the defense is, that it is attempting to show that the real contract between the parties was different from that expressed in the deed, which, upon well-settled principles, cannot be done; and in the second point of view, the objection is equally fatal, as has already been shown, that a covenant before breach cannot be discharged by parol.

This view of the case would seem to show that if the action had been

brought by and for the benefit of the grantee himself, instead of his assignee, the defense could not be sustained at law; though there are some peculiarities in the case to which I have not particularly adverted, which, as between the original parties, might affect or vary its character: Butler's note, 332, to Co. Lit. 385. Even a formal technical release from the covenant by the covenantee, after the assignment, and a breach in the hand of the assignee, would not discharge it: *Middlemore v. Goodale*, Cro. Car. 503. The case must be brought within the principle of fraud, and the assignee must be affected with it, before a defense of the nature of this can be available, and perhaps even then it is not available at law. In the language of one of the plaintiff's points, to allow a secret agreement in opposition to the plain import of a covenant running with the land, to control and annul it in the hands of a *bona fide* assignee, would be a fraud upon such assignee which the law will not tolerate. The pleas do not charge the plaintiff with any notice whatever of the secret agreement between the defendant and Sandford, nor with any actual notice of the existence of this incumbrance at the time of his purchase; though if such actual knowledge had existed, I do not perceive that it can vary or affect the case.

SEC. 5. EXECUTION.

MACKAY v. EASTON.

19 Wall. (U. S.) 619; 22 L. Ed. 211. (1873)

* * * The execution of the contract and the second deed of Smith, with his mark, is a circumstance, but in the light of the facts following their execution, a slight one against the theory of identity of the grantors in the two deeds. The use of a mark for his name may have resulted from temporary causes, or difficulty in writing, and not inability to write. But whatever the cause, the use of the mark in the one case, and of the name in the other, before a public officer, was sanctioned by the acknowledgment of the grantor, whether made by his own hand or by another in his presence and by his direction. * * *

GRIDER v. AMERICAN FREEHOLD LAND MORTGAGE CO.

99 Ala. 281; 42 Am. St. Rep. 58; 12 So. 775. (1892)

HEAD, J. * * * An important question arising in this case is, What conclusiveness shall be accorded to the certificate of acknowledgment of the execution of a mortgage made in due form by an officer authorized by the laws of this state to take and certify such acknowledgments? The bill avers that Mrs. Grider, the wife, although she signed with her husband the mortgage to the American Freehold Land Mortgage Company of London (Limited), and although there is appended to the mortgage the certificate, in due form, of a justice of the peace, certifying her due acknowledgment of its execution, yet, in fact, she never made the said acknowledgment before said justice, or any other acknowledgment before any officer; that the justice of the peace was not present when she signed the mortgage, and never took any acknowledgment from her with reference to the execution of the same, and that said certificate of acknowledgment is wholly untrue. There is in the bill no charge of fraud or collusion on the part of anyone in procuring the certificate; and upon the averments, as we find them, it must be assumed that the mortgagee took the mortgage and parted with its money in reliance upon the truth of the certificate without any notice of its falsity. The complainants contend that they are entitled to show the fact alleged to avoid the mortgage of the homestead, even against a *bona fide* mortgagee without notice. The defendant contends that they are concluded by the certificate.

It must be regarded as settled by the great weight of authority that when the grantor or mortgagor appears before the officer, and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, the certificate is conclusive of the truth of all the facts therein certified, and which the officer was by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or of which he had notice at the time of parting with the consideration. The taking and certifying of the acknowledgment are held in many of the cases to be of a judicial nature, and when the officer has jurisdiction, so to speak, by having the party acknowledging and the instrument to be acknowledged before him, and enters upon and exercises this jurisdiction, the parties will not be allowed to impeach the truth of the facts which he is required by law to certify, and does certify, in the absence of fraud or duress as above stated;

Louden v. Blythe, 16 Pa. St. 532; 55 Am. Dec. 527; 27 Pa. St. 22; 67 Am. Dec. 442; * * *.

In Halso v. Seawright, 65 Ala. 431, however, where the question was whether the clerk of a probate judge was authorized to take and certify an acknowledgment, the act was held to be of a ministerial and not judicial nature, and that, therefore, the clerk was authorized; but in the later case of Griffith v. Ventress, 91 Ala. 366, 24 Am. St. Rep. 918, this court, without referring to Halso v. Seawright, 65 Ala. 431, declared it to be a judicial act, and this may now be regarded as the settled doctrine of this court. In Shelton v. Aultman, 82 Ala. 315, it was contended by counsel, upon the authority of Halso v. Seawright, 65 Ala. 431, that the decisions sustaining the conclusive character of the certificate should be overruled; arguing that as the officer acts in a ministerial capacity, as held in Halso v. Seawright, 65 Ala. 431, parol evidence should be admitted to falsify the certificate in any and every respect; but the court, speaking by Justice Clopton, said that whatever may be the capacity in which the officer acts, the rule as established may now be regarded as a rule of property, which it would be unwise and unsafe to disturb.

It must, therefore, as we have said, be considered as settled that where the grantor has appeared before the officer, and an acknowledgment of some kind has been taken, the certificate of the officer in due form, whether he acts ministerially or judicially, is conclusive of the facts certified, and which he is by law authorized to certify; but the same may be impeached for duress or fraud in which the grantee or mortgagee participated, or had notice of, before parting with his money.

We have examined a great many authorities, and find only the following wherein the question we are now called upon to decide, viz., What effect shall be accorded to the officer's certificate, when the allegation is that the party never in fact appeared before the officer, or made any acknowledgment at all, was raised or adjudicated.

In Michener v. Cavender, 38 Pa. St. 334, 80 Am. Dec. 486, the officer certified to the wife's acknowledgment. She in fact never appeared before him, or acknowledged the mortgage in any manner. The mortgagee was innocent. The court, recognizing the general rule above stated, in cases where there was an actual acknowledgment, ruled that the wife was not bound by the certificate, and discussed at some length the rights in such a case of the mortgagee, as a *bona fide* purchaser without notice. The judge said, *inter alia*: "To call the mortgagee a *bona fide* purchaser, and put her to proof that he knew

she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would therefore be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But, because they are taken without notice, do they become genuine? * * * To carry the doctrine of notice to such extent would subvert all law and justice. A purchaser of real estate who finds the deeds in the channels of the title all duly acknowledged is certainly not required to go up the stream, and inquire of every married woman if she executed her deed voluntarily, and acknowledged it according to law; and, if he pay his money on the faith of such title deeds, he is to be protected; and this probably is all that was meant by what judges have said about purchasing without notice."

In *Allen v. Lenoir*, 53 Miss. 321, the wife signed, but never in fact acknowledged, the mortgage, or went before the officer, as his certificate affirms she did. Judge Campbell said: "We cannot escape the conclusion, after an earnest effort to avoid it, that the mortgage was never acknowledged by Mrs. Lenoir, and that the certificate that she had acknowledged it is untrue. A proper acknowledgment is an essential part of the execution of a conveyance of her land by a married woman. * * * The decree, being based on the mortgage, is erroneous." And in *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699, the same judge adhered to this view, and upon a review of the authorities, distinguished such a case from the case where an acknowledgment of some kind was made, but assailed because not made, in respect of its details, in the manner required by law.

In *Burland v. Walrath*, 33 Iowa, 130, the wife neither signed nor acknowledged the mortgage, and the court held the certificate, which as to her was in due form, open to attack. The case, however, is unsatisfactory as authority on the point we are considering, since no illusion is made to the question of *bona fides* or notice on the part of the mortgagee; nor does it appear from the facts that he was a *bona fide* mortgagee without notice of the falsity of the certificate.

In *Smith v. Ward*, 2 Root, 374, 1 Am. Dec. 80, it was held that parol evidence is admissible to prove that the grantor did not appear before the certifying officer and make acknowledgment; but, like the case last

cited, the discussion is meager, and makes no reference to the rights of *bona fide* purchasers.

In *Meyer v. Gossett*, 38 Ark. 377, the court held that where there is no appearance before the officer, and no acknowledgment in fact, the officer's false certificate of acknowledgment is void *in toto*; but the distinction was closely drawn that, where there are an appearance and acknowledgment in some manner, the certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition brought home to the grantee. It appeared that the grantee was a purchaser for value without notice of the falsity of the certificate. That case was adhered to in *Donahue v. Mills*, 41 Ark. 421.

In *Williamson v. Carskadden*, 36 Ohio St. 664, the general rule as to conclusiveness of the certificate is recognized, but the court says: "If it is true, as alleged by the defendants, * * * that they never appeared before the officer, or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defense, it is not necessary to show that the mortgagee had notice of such fraud. In fact, the governing principle is very broad. Thus, it has been held that in an action on a recognizance, which is regarded as a record, a plea in bar that the defendant did not acknowledge the recognizance is sufficient; and however it may be as to the right to attack a judgment on the ground that there was no jurisdiction over the person it is not denied that, in a proper case, a judgment may be directly impeached on that ground."
* * *

From the foregoing review of the authorities, we must realize that the question we are called upon to decide is by no means free from difficulty. We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them; yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another.

Under the laws of this state the official examination and acknowledgment of the wife prescribed by the statute, and duly certified by the

officer, are essential and indispensable parts of the valid execution of a conveyance of the husband's homestead. Without them there is no execution of the conveyance. It matters not how formally signed or abundantly attested, if these statutory requisites are wanting, the conveyance is a nullity. In *Allen v. Lenoir*, 53 Miss. 321, the court said: "A proper acknowledgment is an essential part of the execution of a conveyance of her land by a married woman"; and this court in *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918, quoted approvingly a similar utterance of the same court in *Harmon v. McGee*, 57 Miss. 414. The objection to the mortgages, therefore, made by the present bill essentially is, that they were never executed, so far as they affect the homestead.

Upon due consideration we are of opinion that the better rule, and the one sustained by the weight of authority, is that, when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers. We approve the rule as it is stated in 1 American and English Encyclopedia of Law, section 6, page 160: "When there is no appearance before an officer his false certificate of acknowledgment is void; but when there is an appearance and acknowledgment of it in some manner, then the official certificate is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee." This must be taken with the qualification that the certificate is conclusive only of the facts the officer is by law authorized to certify.

* * *

HITZ v. JENKS.

123 U. S. 297; 8 Sup. Ct. 143; 31 L. Ed. 156. (1887)

* * * "That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion. In *Drury v. Foster*, Mr. Justice Nelson, in delivering judgment, observed: "There is authority for saying that, where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the

examination of the *feme covert*, embracing the requisites of the statute as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive." 2 Wall. 24, 34. And in *Young v. Duvall*, the court said that if the officer's certificate "can be contradicted, to the injury of those who in good faith have acted upon it, the proof to that end must be such as will clearly and fully show the certificate to be false or fraudulent. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity of titles to real estate, which would inevitably flow from one less rigorous." 109 U. S. 573, 577, 3 Sup. Ct. Rep. 415.

It would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, can afterwards, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate. *Comegys v. Clarke*, 44 Md. 108; *Jamison v. Jamison*, 3 Whart. 457; *Williams v. Baker*, 71 Pa. St. 476; *Harkins v. Forsyth*, 11 Leigh, 294; *Greene v. Godfrey*, 44 Me. 25; *Baldwin v. Snowden*, 11 Ohio St. 203; *Graham v. Anderson*, 42 Ill. 514; *Dolph v. Barney*, 5 Or. 191; *Johnston v. Wallace*, 53 Miss. 331; *Hartley v. Frosh*, 6 Tex. 208. See, also, *Bancks v. Ollerton*, 10 Exch. 168, 182." * * *

YOUNG v. GUILBEAU.

3 Wall. (U. S.) 636; 18 L. Ed. 262. (1865)

* * * With this statute in force, Mrs. Younge brought trespass against Guilbeau and eleven others in the Federal Court for the Western District of Texas, to try the title to a lot of ground in that district. She proved that the lot belonged originally to one Nixon, her ancestor, now deceased, and that she was his sole heir. Guilbeau and the others, defendants in the case, admitting the original ownership alleged, set up that Nixon had conveyed the lot, by deed, in his lifetime to a certain

Shelby; from whom they, Guilbeau and the other defendants, derived title to themselves.

The suit thus involved, in its merits, the existence of a deed from Nixon to Shelby.

No original deed to Shelby was produced. A document, however, purporting to be a deed executed by Nixon to Shelby, embracing the premises in question, bearing date the 10th day of October, 1838, and acknowledged the 29th of the same month, had been filed for record on the 7th of December, 1846, in the office of the clerk of the proper county, in Texas, and was afterwards in due form placed on the records of the office. A certified copy of this instrument was offered in evidence by the defendants and admitted against the objection of the plaintiffs. * * *

MR. JUSTICE FIELD delivered the opinion of the court:

* * * We might rest our decision here, but it is proper to notice another ruling of the court below, to prevent its repetition on a second trial. The proof of the execution of the deed necessarily involved proof of its delivery. The evidence offered, so far as appears by the record, showed that the grantor never parted with its possession, except as may be inferred from the fact of its registry. And the grantee testified that he never knew of its existence until after the death of the grantor, among whose papers it was found; and that he never claimed any interest in the property. Yet the court instructed the jury that as there was no contest of creditors against the deed, the instrument was binding, whether delivered or not. In this instruction there was also clear error. The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify in the absence of opposing evidence, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was of course made without the assent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor.

The judgment of the District Court must be reversed, and the cause remanded for a new trial; and it is so ordered.

SCRUGHAM v. WOOD.

15 Wend. 545; 30 Am. Dec. 75. (1836)

Ejectment to recover the plaintiff's dower land. The question turned upon the validity of a deed made by the plaintiff's husband before marriage, by which he conveyed all his real estate to the defendants, in trust for himself during his life and for his children after his death. The deed was signed and acknowledged by all the parties before a commissioner of deeds, and was recorded. It did not appear that there was any formal delivery, and after the grantor's death the instrument was found among the grantor's papers.

NELSON, J. The facts in the bill of exceptions are abundantly sufficient to justify the charge of the court below, and the verdict of the jury. No one can doubt, from the account of the execution of the deed given by the commissioner, in connection with the previous preparation of it at the instance of Scrugham, that it was the understanding and intent of all parties at the time of the execution and acknowledgment, that it was delivered, or in other words, that the family settlement was complete.

The position to be found in the learned commentaries of Chancellor Kent, vol. 4, pp. 455, 456, that "if both parties be present, and the usual formalities of execution take place, and the contract is to all appearance consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor," is amply sustained by the authorities referred to by him. He had in the case of *Souveryby v. Arden*, 1 Johns. Ch. 240, before fully considered and reviewed all the leading cases on the point, both in law and equity, and in the opinion delivered by him as chancellor, the above proposition will also be found, p. 256. It has received confirmation by subsequent cases, both here and in the English courts: 17 Id. 548, 577; 5 Barn. & Cress. 671. The position extracted by the reporter from the last case is as follows: "Where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential."

It would be useless to go over the cases again, after the review of

them in the court of chancery here, and in the king's bench in England, and a concurrence in the same conclusion. Besides, this case is stronger than either of the two to which I have referred, because, as justly remarked in the court below, the grantor was much more interested in the execution and preservation of the deed than either of the trustees; and the fact of its being in his possession at his death; therefore, does not, under the circumstances of the case, necessarily create any presumption against the idea that a delivery was intended at the time of its execution. The facts offered to be proved were properly excluded, as they had no pertinent bearing upon the point in issue. If they proved anything, it was that Scrugham had made special provision, before his death, for the maintenance of the plaintiff after his decease, and tended rather to negative the idea that he expected she would be provided for by means of her dower.

PARROTT et al. v. AVERY.

159 Mass. 594; 38 Am. St. Rep. 465; 35 N. E. 94. (1893)

Real action by Burdella Parrott and others against Miles W. Avery, submitted on an agreed statement of facts. Demandants claimed title under the residuary clause of the will of Miles Avery, deceased, while the tenant claimed title under a deed of the land executed by testator, and also under a clause of the will giving him a chest and its contents, in which chest was a deed to him of the land in question. There was a judgment for demandants, and the tenant appeals. Affirmed.

ALLEN, J. I. The agreed facts fail to show a delivery of the deed in the grantor's lifetime. The grantor retained control of the deed and of the land. There was no prior bargain with the grantee, and no indebtedness to him nor relation of trust towards him. He had no knowledge of the execution of the deed. The only consideration was love and affection. The deed was not recorded during the grantor's lifetime. There was no oral declaration by the grantor that he meant to have it take effect at once. In short, there was nothing tending to show a delivery of the deed except the bare fact that it was executed in the presence of a witness. The question of delivery is a question of fact, and delivery in the grantor's lifetime must be proved. There must have been an intention that it should operate as a present conveyance of title. A finding of the delivery of the deed would not be war-

ranted on the agreed facts. *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. Rep. 378; *Shurtleff v. Francis*, 118 Mass. 154; *Hawkes v. Pike*, 105 Mass. 560; *Brabrook v. Bank*, 104 Mass. 228, 232; *Chase v. Breed*, 5 Gray, 440; *Younge v. Guilbeau*, 3 Wall. 636, 641; 3 Washb. Real Prop. (5th Ed.) 299 *et seq.* There were no acts or declarations of the grantor sufficient to show an intent to treat it as delivered, or circumstances such as were found to be sufficient in *Lowd v. Brigham*, 154 Mass. 107, 113, 114, 26 N. E. Rep. 1004, and cases there cited, and in *Regan v. Howe*, 121 Mass. 424.

2. Even though it be assumed that the undelivered deed was in the chest when the will was signed, the gift in the will of "my chest and its contents, except the bank books," does not operate as a devise of the land. The danger of using words of this kind in a will is pointed out by Chitty, J., in *Robson v. Hamilton*, L. R. (1891) 2 Ch. 559, because an article may be in the chest one day and out of it the next, or may be put there for safe-keeping during the testator's last illness by somebody who is taking care of things which are found lying about. Moreover, this form of gift, if it speaks from the death of the testator, would enable him to increase or diminish his gift at pleasure by putting things into the chest or taking them out from time to time, thus accomplishing what cannot be done by referring in the will to a separate paper thereafter to be prepared and signed by the testator. *Thayer v. Wellington*, 9 Allen, 283. However, this aspect of the case need not be dwelt on, because the words of the gift are not sufficient to carry the land, even though it was clearly proved that the deed was in the chest all the time. The reason of this is that the deed is not to be considered as property in itself, but evidence of title to property situated elsewhere. Land cannot be deemed to be included among the contents of a chest, merely because a deed conveying it, or an undelivered deed describing it, is contained therein. Many cases are to be found in the books where questions have arisen whether gifts of goods, or chattels, or property, or things contained in or the contents of a certain place, or house, or closet, or cabinet, or desk, or trunk, should be held to include money, bonds, promissory notes, banker's receipts, or other similar articles of personal property, and the decisions have not been uniform. See cases cited in 1 Jarm. Wills, (6th Amer. Ed. by Bigelow,) 709 *et seq.*; 2 Williams, Ex'rs, p. 1060 *et seq.*; Theob. Wills, (3d Ed.) 145; *Penniman v. French*, 17 Pick. 404; *Lock v. Noyes*, 9 N. H. 430. But no case has been cited by counsel, or found by us, in which it has been held that land would pass under such a gift by reason of a deed thereof being found among the contents of the place

or receptacle designated. On the other hand, title deeds have been selected as the most striking illustration of what would not pass under such general words. *Brooke v. Turner*, 7 Sim. 671; *Robson v. Hamilton*, (1891) 2 Ch. 559, 565, 566. And a mortgage has been expressly held not to be so included, in *Fleming v. Brook*, 1 Schoales & L. 318, and *Brooke v. Turner*, *ubi supra*. It is not as if the testator, in his will, had made a gift of the deed in express terms, or had directed it to be delivered to the tenant. That would have presented a different question. It is, of course, possible that the testator may have mistakenly supposed that his undelivered deed to the tenant would be effectual to convey the land after his own death. If that was so, it might be a reason why he did not give the land to the tenant by his will; but it would not change the construction of the will itself, and enlarge the meaning of the words used, so as to make the land pass under the gift of the chest and its contents. Judgment for demandants affirmed.

BROWN et al. v. WESTERFIELD et al.

47 Neb. 399; 53 Am. St. Rep. 532; 66 N. W. 439. (1896)

NORVAL, J. This was a suit by Ruthie Brown against Sam Westerfield and Ida Westerfield, his wife, and Louis and Jimmie Brown, to quiet the title in plaintiff to the south half of lot C, a subdivision of lots 4, 5, and 6 in block 28 of Kinney's O Street addition to the city of Lincoln. The petition alleges that plaintiff is the only living child of Hannah and James Brown; that on the 20th day of June, 1883, the said Hannah Brown, now deceased, being the owner in fee simple of the real estate above described, together with her husband, said James Brown, made and executed a warranty deed to the plaintiff of said property, reserving a life estate therein to said James Brown; that said deed has become lost or stolen,—plaintiff is unable to state which, but is informed that the same was placed in the hands of Sam Westerfield, one of the defendants; that, though demand for the same has been made upon him, he has refused to comply therewith, and disclaims all knowledge of the deed; and that the defendants Sam Westerfield, Jimmie and Louis Brown, are not the issue of the said James and Hannah Brown, but are children of said Hannah Brown by a former husband. James Brown, plaintiff's father, was, subsequent to the in-

stitution of the suit, joined as party plaintiff; and, no service of summons having been had upon Louis and Jimmie Brown, the action was dismissed as to them. Sam Westerfield answered, admitting that plaintiff is the child and one of the heirs at law of said Hannah Brown, and denying all other averments of the petition. By way of cross petition, Westerfield sets up that Hannah Brown and her husband, James Brown, executed and delivered a mortgage upon said lot C to one Mary Jane Carman, to secure the payment of \$27 and interest; that the defendant is the owner of said mortgage; and that the debt for which the same was given to secure has not been paid, nor any part thereof. The answer prays for the dismissal of plaintiff's suit, and for foreclosure of said mortgage. Upon the hearing a decree was entered quieting the title to the premises in controversy in Ruthie Brown, subject to the life interest therein of her father, and foreclosing said mortgage. From the decree quieting the title the Westerfields appeal.

The appellants contend, in argument, that the petition is defective, and fails to state a cause of action, in that it contains no specific allegation that the deed in question was ever delivered. The delivery of a deed is indispensable to its validity. While it is true there is no direct averment in the pleading that the deed had been delivered, yet this is not fatal. It is averred that the grantors "made and executed a warranty deed to the plaintiff" to the property. "Execute" is defined by Webster thus: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing, perhaps sealing and delivering; as to execute a deed, lease, mortgage, will," etc. And the same authority gives the following as one of the definitions of the word "execution": "The act of signing and sealing and delivering a legal instrument, or giving it the forms required to render it valid; as the execution of a deed." In 1 Warv. Vend. p. 482, it is said: "The term 'execution' primarily means the accomplishment of a thing,—the completion of an act or instrument; and in this sense it is used in conveyancing, to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument, which are the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee." In this state the seal of the grantor is unnecessary, and an acknowledgment is no part of the deed conveying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title. The averment in the petition that the grantors "made and executed" the deed, under the definitions already given, includes the

delivery of the instrument, as a conveyance of the property.

The uncontradicted testimony shows that James and Hannah Brown signed and acknowledged a deed of conveyance to their daughter, Ruthie Brown, one of the plaintiffs herein, for the premises in controversy; reserving a life estate therein to James Brown, one of the grantors. It was never actually delivered to the grantee in person, nor was it ever placed upon record. The instrument is not now to be found. A deed is merely the evidence of the grantee's title. The loss or destruction of the deed did not divest plaintiffs of their title, if they ever acquired one. And whether the title ever passed from Mrs. Brown, the owner of the fee, to this property, depends upon whether the facts disclosed by this record amount, in law, to a delivery of the deed in question.

It appears from the evidence adduced that Hannah Brown, being the owner of the property in dispute, and another tract of the same size, adjoining it on the north, on the 20th day of June, 1883, caused two deeds to be prepared by J. H. Brown, a justice of the peace of the city of Lincoln,—one, covering the north portion, to Sam Westerfield, one of the defendants, and the other, covering the south tract, to Ruthie Brown, subject to a life interest in her father, James Brown. These deeds, properly witnessed, were signed and acknowledged by both Hannah and James Brown before said justice of the peace. The magistrate is the only person who testified as to what transpired at the time, and the disposition made of the deeds. He states, in substance: That he had acted as Mrs. Brown's legal adviser, having at various times transacted considerable business for her. That on the date already mentioned, at her request, he went to see her, when she informed him it was her desire that the property be divided between her two children, Ruthie and Sam, the former being then some 9 or 10 years old, reserving a life interest in her husband in the home property. That her two sons Jimmie and Louis had abandoned her, and it was her wish to make a division of the property then, for fear they would come in for a share at her death. In pursuance of this request the two deeds were prepared by the witness, and then signed and acknowledged. The magistrate was requested to keep them, and place them upon record after her death. He carried them for two or three days thereafter, when he went to Mrs. Brown's place of abode, put them in a tin box in which she kept her tax receipts and other papers; and at the time the witness, at Mrs. Brown's request, promised to see to the recording of the deed in question upon her death. That four or five times thereafter (the last one being about a week or 10 days before Mrs. Brown

died) she talked the matter over, expressing herself satisfied with the disposition she had made of the property. That immediately after the death of Mrs. Brown the justice, with James Brown, looked for the deed, and then discovered that it was gone. Sam Westerfield testified that he had never seen the deed, but had heard it spoken of by several, and that the deed to himself he had recorded August 28, 1883, prior to his mother's death. Ruthie Brown testified that about a week before her mother died the latter told her, as she had frequently stated before, that the place was Ruthie's, and it had been fixed so that she would have a home; that about two weeks before the trial witness asked Sam Westerfield about the deed, and he replied that he had it, or knew where it was. This conversation Westerfield denies having ever occurred.

The matter of contest is whether there was, in law, a delivery of the deed, for a delivery is indispensable to its binding effect. But as was said by Chief Justice Lake in *Brittain v. Work*, 13 Neb. 347, 14 N. W. 421: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor, from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Delivery of a written instrument, like a deed, is largely a question of intent, to be determined by the facts and circumstances of the case. In the case at bar it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title, to take effect presently. In other words, did Mrs. Brown part with control over the instrument, and place the title in her daughter? If such was the purpose, the delivery was complete, and the title to the property passed. 1 Devl. Deeds, sections 260-262; *Warren v. Swett*, 31 N. H. 332; *Jordan v. Davis*, 108 Ill. 336; *Burkholden v. Casad*, 47 Ind. 418; *Masterson v. Cheek*, 23 Ill. 73. From an examination of the evidence, we are satisfied that it establishes a delivery of the deed. It was placed in the hands of the magistrate who took the acknowledgment, to hold for the grantee. This was sufficient to carry the title to the land. *Byington v. Moore*, 62 Iowa, 470, 17 N. W. 644; *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. 626; *Black v. Hoyt*, 33 Ohio St. 203; *Mitchell v. Ryan*, 3 Ohio St. 377; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Ball v. Foreman*, 37 Ohio St. 132. In the case last cited the grantor delivered the deed to a third party, with the understanding that he should retain the custody of the same until the grantor's death, when he was to deliver it to the grantee. It was held to be the grantor's deed *in presenti*, and that the subsequent destruction of the instrument by the grantor did not have the

effect to divest the title of the grantee. Cassody, J., in delivering the opinion of the court in that case, cites numerous authorities which sustain the proposition enunciated in the case. In *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. 626, Eva Hinson went to a justice of the peace, and signed and acknowledged a deed, before him, conveying certain lands to her children. She left the deed in the possession of the magistrate, with directions to retain it until her death and then have it recorded. The justice told her that she could have the deed whenever she desired it, but she replied: "I don't want it. You must keep it until I die." It was held to be a good delivery, and that the deed took effect immediately upon the delivery to the justice. See, also, *Wittenbrock v. Cass* (Cal.) 42 Pac. 300; *Bury v. Young* (Cal.) 1 Am. Law Reg. & Rev. (N. S.) 140, 33 Pac. 338. It is true, in the case before us, that after the delivery of the deed to Justice Brown, he took it to the grantor, and put it in a box where she kept her papers; but it was not with the intention of surrendering the deed, nor did that fact have the effect to divest the title of the grantee. Having once passed, it could not be divested in that way. *Bunz v. Cornelius*, 19 Neb. 107, 26 N. W. 621; *Connell v. Galligher*, 39 Neb. 793, 58 N. W. 438.

It is argued by appellants that the conveyance was intended to operate in the nature of a testamentary disposition of the property, not to take effect until the death of Mrs. Brown, and authorities are cited in the brief to the effect that such a deed is invalid. The facts do not warrant such conclusion. The intention clearly was that the deed should take effect at once. The recording alone was to be deferred until Mrs. Brown's death. This is not a case where a grantor has placed a deed in a depository, to be delivered to the grantee upon the death of the grantor, reserving the right to recall the deed at any time. The authorities cited by counsel for appellants are therefore not applicable here. We are constrained to hold that the trial court was, under the circumstances, justified in finding a sufficient delivery of the deed. The decree is affirmed.

Affirmed.

Note: There is an extensive note on the subject of delivery of deeds in 53 Am. St. Rep. 537.

THOMPSON v. THOMPSON.

9 Ind. 323; 68 Am. Dec. 638. (1857)

GOOKINS, J. This was an action to recover real estate. Both parties claimed the property under James A. Thompson, deceased: William Thompson, the plaintiff, as purchaser, and Martha E. Thompson, the defendant, as his devisee. The judgment below was for the defendant.

The plaintiff claimed title under a deed alleged to have been made by the deceased, which was never recorded, and has been lost. One Moore testified that in 1839 he was residing with the deceased; that at his request he accompanied him to the house of a justice of the peace, residing some eight or ten miles off; that James A. Thompson acknowledged before the justice a deed for the land in question to his brother, William Thompson; that it was a deed in fee-simple with warranty of title; that he read and witnessed it; that he could not remember the consideration expressed; that they returned home by way of Covington, the plaintiff's place of residence, where the deed was delivered to him. He believed the name of the justice was Lewellyn. The witness did not describe the lands by their congressional subdivisions and numbers, but identified one eighty-acre tract as the home farm, and three others as the Shoafstall farm—the two farms lying about a mile apart. The deceased lived on the home farm, which lay within about three-fourths of a mile of Covington.

The plaintiff deposed that the deed was lost; that he had made diligent search for it, and it could not be found; and that he had neglected to have it recorded.

It was proved that a justice by the name of Lewellyn resided at the time in Wabash township, Fountain county, eight or ten miles from Covington, who was dead; that the justice and the recorder resided at the same time in Covington, who were still alive; and no reason was given why the deed was not acknowledged before one of the latter instead of before Justice Lewellyn. * * *

The plaintiff prayed the following instruction: "If the jury believe that James A. Thompson, in the spring or summer of 1839, executed to William Thompson a deed for the land in dispute, in consideration of the execution to James by William of the note or agreement read in evidence, and that since the death of James, and before the commencement of this suit, William tendered to the administrator of the estate of James the amount of said note, and demanded possession of said lands, the jury must find for the plaintiff, unless they are satisfied

that William Thompson has reconveyed said lands to James."

The foregoing was the second of a number of instructions prayed by the plaintiff. The third refused, and the fourth refused as asked and given as modified, will be considered in connection with it, without setting them forth at length. They raise the question whether the grantee in a conveyance can, as between himself and the grantor, defeat his right to recover the property by any other means than by a reconveyance. On this question we think the law was correctly given to the jury in a modification of the fourth instruction. It is as follows: "If the deceased got possession of the deed by delivery, or with the consent of William, with the view of surrendering the title conveyed by the deed, William cannot recover."

His inability to recover would not, in such a case, be because lands can be conveyed by parol, but because he has voluntarily destroyed the evidence of his title. He cannot be permitted to allege that a deed is lost, and thereupon give parol evidence of its contents, when he has surrendered it to be canceled. The deed is not lost in such a case.

We say nothing at present in reference to a recorded deed, where the record is made, as under our statutes, of the same grade of evidence as the original. There would be this difference in the two cases: the parol proof might vary from the lost instrument, while the record would be a transcript of it: See, *Mason v. Grant*, 21 Me. 160; *Wilson v. Cassidy*, 2 Ind. 562; *Speer v. Speer*, 7 Id. 178 (63 Am. Dec. 418); 1 *Greenl. Ev.*, sec. 265, note 3. We intentionally limit the rule, as here laid down, to cases between the parties to the deed and those standing in the same relation to each other. * * *

CHAPTER XXV.

WILLS.

OSBORN v. COOK.

11 Cushing, 532; 59 Am. Dec. 155. (1853)

THOMAS, J. The only question raised upon the appeal and the agreed statement of facts is, whether the instrument was duly executed.

This question must be determined by a just construction of the provision of the revised statutes, c. 62, sec. 6, which is: "No will, excepting nuncupative wills, shall be effectual, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by three or more competent witnesses."

This will was in writing, signed by the testator, and attested and subscribed in his presence by three competent witnesses. It was written by the testator. He knew, therefore, if of sound mind, what he signed, and what he asked the witnesses to attest. The calling upon witnesses to attest his execution of an instrument whose character and contents he well knew was in effect a declaration that the instrument he had signed and his signature to which he desired them to attest was his act, though the character and contents of the instrument were not disclosed to them. It was as if the testator had said: "This instrument is my act; it expresses my wishes and purposes; and though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence." We think all the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents or of its nature, is in terms required. The legislature have prescribed certain solemnities to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses what is in the will, or even that it is a will.

A usage has doubtless existed to some extent in the probate courts, to inquire of the subscribing witnesses whether the testator declared

the instrument he had signed to be his will; and such a declaration frequently makes part of the clause of attestation; but such declaration is not necessary. There may exist very excellent reasons why the testator may not wish to disclose, and why the law should not require him to disclose, the fact that he has made a will at all; either, as Swinburn says, "because the testator is afraid to offend such persons as do gape for greater bequests than either they have deserved or the testator is willing to bestow upon them (lest they, peradventure, understanding thereof, would not suffer him to live in quiet); or else he should over-much encourage others to whom he meant to be more beneficial than they expected (and so give them occasion to be more negligent husbands or stewards about their own affairs than otherwise they would have been if they had not expected such a benefit at the testator's hands); or for some other considerations." Swinburn on Wills, 27.

It is not easy to trace the origin of the belief, which we are aware is quite prevalent, of the necessity of some formal publication of a will, or declaration by the testator that the instrument is his last will and testament; but as a question of principle or of authority, it is now settled that such publication or declaration is unnecessary.

In the case of *Wyndham v. Chetwynd*, 1 Burr., 421, Lord Mansfield says: "Suppose the witnesses honest, how little need they know; they do not know the contents; they need not be together; they need not see the testator sign (if he acknowledges his hand, it is sufficient); they need not know it is a will (if he delivers it as a deed, it is sufficient)." In *Bond v. Seawell*, 3 Id. 1775, Lord Mansfield says: "It is not necessary that the testator should declare the instrument he executed to be his will." And *Trimmer v. Jackson*, in the king's bench, cited in 4 Burn's Ecc. Law, 9th ed., 102 (6th ed. 129), was a case where the witnesses were deceived by the execution, being led to believe, from the words used by the testator, that it was a deed, and not a will; and it was adjudged a sufficient execution: See also *Wallis v. Wallis*, Id. 100 (6th ed. 127). In *Moodie v. Reid*, 7 Taunt, 361, Chief Justice Gibbs says: "A will, as such, requires no publication; be publication what it may, a will may be good without it."

In the more recent case of *White v. Trustees of the British Museum*, 6 Bing. 310, it was held that a will was sufficiently attested when subscribed by three witnesses, in the presence and at the request of the testator, although none of the witnesses saw the testator's signature, and only one of them knew what the instrument was. Chief Justice Tindal treats the law as fully settled, that a bare acknowledgment by the testator of his handwriting is sufficient to make the attestation and

subscription of the witnesses good within the statute, although such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing: See also *Wright v. Wright*, 7 Id. 457; *Johnson v. Johnson*, 1 Crompt. & M. 140.

In *Ilott v. Genge*, 3 Curt. 181, Sir Herbert Jenner Fust, referring to the case of *White v. Trustees of British Museum*, *supra*, says: "This is a determination, that where a testator had written a will himself and signed it, and produces that will so signed (for that is a point never to be lost sight of) to witnesses, and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them is his will, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will." It would be more exact to say the instrument is acknowledged to be his act, which, upon production, is found to be his will.

In our own commonwealth the decisions lead to the same conclusion. In the case of *Swett v. Boardman*, 1 Mass. 258 (2 Am. Dec. 16), relied upon by the appellees, the marginal note of the reporter is calculated to mislead. The case was decided, and rightly, upon the ground that the testator did not know he was executing his will. Sewall, J. says: "I do not find any cases which have been decided expressly determining what amounts to a publication. But there must be proof that the person knew the instrument to be his will; that he intended it as such. In the case now under consideration there is no evidence, except the signature of the deceased, of these facts. I do not think that any particular ceremony of publication is necessary or material; but the deceased ought at least to have known and understood that he was executing his will." Sedgwick, J., places the decision upon the same ground; but says: "It ought at least to appear that the person knew he was executing his will, and that he communicated that fact to those who were called to attest the same as witnesses; and this is necessary to prevent imposition, from the situation in which persons frequently are at the time of executing these instruments." This point does not seem necessary to a determination of the case, or to be in harmony with the authorities; and the reason of it would not apply to the case of a will written by the testator himself. Dana, C. J., puts the decision upon the same ground—that there was not a particle of evidence that the testator knew he was making a will.

The more recent cases, *Dewey v. Dewey*, 1 Met. 349 (35 Am. Dec. 367), and *Hogan v. Grosvenor*, 10 Id. 54 (43 Am. Dec. 414), recognize and adopt the principles stated in the case of *White v. Trustees of*

British Museum, *supra*. In *Hogan v. Grosvenor*, *supra*, Hubbard, J., said: "We consider the law as settled, that the testator need not execute the instrument in the presence of the witnesses; that they need not sign in the presence of each other; and that all which is required is, that the testator shall see their attestation, or be in a situation where he can see it. His acknowledgment that the instrument is his, with a request that they attest it, is sufficient."

The doctrine of these cases covers the ground of this. If any declaration is necessary, it requires no set form of speech, indeed, no words; it may be done by acts as well as words. *Non quod dictum, sed quod, factum est, inspicitur*. And the presentation of the instrument, written by the testator himself and bearing his signature, to the witnesses, with a request for them to attest it, was sufficient.

SIMMONS v. LEONARD.

91 Tenn. 183; 30 Am. St. Rep. 875; 18 S. W. 280. (1892)

CALDWELL, J. This is a contested will case. In February, 1877, Miss Margaret Simmons, who was both old and illiterate, died at her residence, in Marshall County, leaving a valuable tract of land and some personalty. In March following, a certain paper writing, alleged to be her last will and testament, and making disposition of her entire estate, was admitted to probate, in common form, in the county court of that county. Dr. John M. Leonard, the principal devisee, was qualified as executor at the same time.

In July, 1887, D. P. Simmons, a brother of the deceased, and other relatives, filed a bill in the chancery court, alleging that the said instrument was not her last will and testament, and seeking an account with the executor.

In pursuance of the direction of the chancellor in interlocutory order, complainants sought to make up and try an issue of *devisavit vel non* in the circuit court; but the circuit judge refused to take jurisdiction, because of the pendency of the suit in the chancery court.

On appeal in error, this court decided (89 Tenn. 622) that the circuit court alone had jurisdiction to try an issue of *devisavit vel non*, and thereupon remanded the case.

The honorable circuit judge thereafter tried the issue without a

jury, and pronounced judgment in favor of the will. Contestants have appealed in error.

Our first inquiry shall be, whether or not Eleazar Cochran and W. F. McDaniel, whose names appear on the propounded instrument as those of subscribing witnesses, make out a case of due and formal execution under the statute. How that is can be determined only by a careful consideration of what they say occurred at the time, the certificate to which their names are attached being in proper form and reciting all necessary facts.

McDaniel testified that he was notified by Dr. John M. Leonard that Margaret Simmons wanted him to witness her will; that he afterwards went by Leonard's house, and they went together to her house; that she brought a paper out on the porch and told him she desired him to witness her will; whereupon he then and there, in her presence and at her request, signed his name to the paper as a subscribing witness; that he at that time, saw the names of Margaret Simmons, the testatrix, and Eleazar Cochran, the other subscribing witness, upon the paper; that no one was then present except the testatrix, Dr. Leonard, a small negro, and witness; and finally, the paper in contest being produced, the witness said it was the same to which he subscribed his name, at the time and under the circumstances already detailed.

This witness shows himself to have been competent, and by his testimony makes a case of due execution, so far as one subscribing witness can make it.

It was not at all necessary that he should see the testatrix sign the paper, nor that he should subscribe it in the presence of the other witness: *Logue v. Stanton*, 5 Sneed, 98; *Rose v. Allen*, 1 Cold. 24; *Bartee v. Thompson*, 8 Baxt. 512; *Beadle v. Alexander*, 9 Baxt. 606; 2 *Greenleaf on Evidence*, sec. 676; 1 *Randall and Talcott's Jarman on Wills*, 212, 213; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Burwell v. Corbin*, 1 Rand. 131; 10 Am. Dec. 494; *Ela v. Edwards*, 16 Gray, 92; *Tilden v. Tilden*, 13 Gray, 110; *Ellis v. Smith*, 1 Ves. Jr. 16; *Eelbeck v. Granberry*, 2 Hayw. 232; 2 Am. Dec. 624; *Johnson v. Johnson*, 106 Ind. 475; 55 Am. Rep. 762; 4 Kent's Com. *516; *Rosser v. Franklin*, 6 Gratt, 1; 52 Am. Dec. 97.

Cochran, the other subscribing witness, died before the trial, and therefore could not be examined in the presence of the court; but his deposition, which had been taken in the chancery cause, was used as evidence in this case.

He deposed that he was a neighbor of Margaret Simmons, deceased;

that Dr. John M. Leonard called on him twice, and told him she wanted him to witness her will; that a negro man, living on her place, was subsequently sent for him, and he then went to her house; that he found her alone, and when he first got there she told him she wanted him "to sign a will" for her, though she did not then produce it, or say more about it; that Dr. Leonard afterward came and "got the will out of the bureau, or off the top of it," and then, at the request of witness, signed the name of witness to it; that this request was made by witness because he was so nearly blind that he could not see well enough to sign his own name; that he, witness, did not have the will in his own hands, or see the testatrix have it in her hands at any time; that she did not sign it in his presence, and he did not know whether she signed it before he went to her house or after he left, if at all; that he did not have the will read or learn its contents.

His name, without more, is attached to the certificate. It is "Eleazar Cochran," simply, and not "Eleazar (x his mark) Cochran," as is usual when a person unable to write has another sign his name for him. There is no mark or sign to indicate that Cochran did not sign his own name, though the fact is, as he states himself, that it was written by Dr. Leonard at his request.

Clearly, Cochran was not a proper subscribing witness. He was competent in the sense of being disinterested, but the part he took in the execution of the alleged will did not give him the full character and functions essential to a subscribing witness. His evidence does not establish such a subscription as the law requires.

To constitute a valid will of real estate, the instrument must be subscribed by two witnesses at least, neither of whom is interested in the devise: Milliken and Ventrees's Code, sec. 3003; *Maxwell v. Hill*, 89 Tenn. 588; *Guthrie v. Owen*, 2 Humph. 202; 36 Am. Dec. 311; *Davis v. Davis*, 6 Lea, 543.

The attempted subscription by Cochran is incomplete because his name, being signed by another person, is not accompanied by some mark or sign indicating his adoption of that other person's act. This court has gone no further in liberal construction of the word "subscribe" than to hold that a person whose name is written by another, and who makes his mark thereto, is a good attesting witness to a will: *Ford v. Ford*, 7 Humph. 96, 97.

Though a mark so made is held to be a sufficient subscription, it is never advisable, where it can be avoided, to employ marksmen as witnesses: 1 Jarman on Wills, 213.

It seems to have been deemed sufficient not only because the name

of the witness is written by his authority, but also because in making his mark he has a share in the writing, as when another person guides his hand and he makes his own signature: *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 694; *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102; *Montgomery v. Perkins*, 2 Met. (Ky.) 448; 74 Am. Dec. 419.

By statute, the word "signature, or subscription, includes a mark, the name being written near the mark, and witnessed": Code, sec. 48.

There is even a greater objection, if possible, to Cochran as a subscribing witness. Though not interested in the devise himself, Dr. Leonard, who wrote his name for him, was the principal devisee under the will. This made the subscription utterly ineffectual. Cochran, though legally competent to become a subscribing witness, could not effectively perform the act of subscription through another person, who was legally incompetent to become such witness in his own name and right. To permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness; the same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the name of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself. He may not, lawfully, take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from the doing of any act, even for the subscribing witness, which is essential to a valid subscription.

Again, though identification has always been the main reason for requiring subscribing witnesses in the execution of wills, Cochran was not asked to identify the paper propounded in this case as the one he claims to have witnessed for Margaret Simmons. Presumably, he could not have done so if asked. Indeed, he shows affirmatively that he could not. He made no inspection of the instrument to which he requested Dr. Leonard to sign his name; did not have sufficient eyesight to inspect it. Hence he could not afterward recognize it by its physical appearance. No name, mark, or sign did he impress upon it that subsequent recognition might be assured, or even rendered possible. Nor was he informed of its contents, so that he might thereby preserve its identity in his memory. Of course it was not essential that the witness should be informed of the provisions of the will: *Higdon's Will*, 6 J. J. Marsh, 444; 22 Am. Dec. 84; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Ela v. Edwards*, 16 Gray, 92; *Tilden*

v. Tilden, 13 Gray, 110; 1 Jarman on Wills, 213. Yet, if the information had been imparted, it might have served him as one means of future identification.

It was necessary, however, that something should occur, and that he should do some act (and that according to law), which, if remembered, would thereafter enable him to swear to the identity of the paper. If no such thing occurred, and no such act was done, then there was no valid subscription.

We do not hold that the fact of due subscription can be shown alone by the subscribing witness. On the contrary, it is well settled that such fact may be established by other persons, though his recollection fail him, or he become openly hostile to the will: *Rose v. Allen*, 1 Cold. 23; *Jones v. Arterburn*, 11 Humph. 98; *Alexander v. Beadle*, 7 Cold. 128; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424.

But the proof of other persons will not suffice, unless it, in truth, shows that all formalities requisite to a valid subscription were observed. There is no such proof of other persons in this case.

Cochran states the whole transaction, so far as he had part in it, without lapse of memory or unfriendliness to the cause of proponent; and no one discloses any additional fact occurring at the time he is said to have subscribed the will. * * *

In re HOLT'S WILL.

56 Minn. 33; 45 Am. St. Rep. 434; 22 L. R. A. 481; 57 N. W. 219.
(1893)

VANDEBURGH, J. The will in question here contains a legacy to Georgiana Needham, estimated by the testator at about four hundred dollars. The will was attested by two witnesses, one of whom was E. Z. Needham, who is, and was at the time of such attestation, the husband of Georgiana. Mrs. Needham is the proponent of the will, and in the probate court objection was made by the contestants, appellants here, to the allowance and probate of the will, on the ground that E. Z. Needham, the husband of the proponent, was not a competent witness to the will.

The action of the probate court, allowing the will, having been

affirmed by the district court, the case is brought here on appeal from the judgment of the last-named court.

1. The first question presented involves the competency of the attesting witness E. Z. Needham. Undoubtedly, he must have been a competent witness at the time of the execution of the will. This is the established doctrine of the common-law authorities, from the case of *Holdfast v. Dowsing*, 2 Strange, 1253, down to the present time: 1 *Redfield on Wills*, 253; 2 *Greenleaf on Evidence*, sec. 691; *Morrill v. Morrill*, 53 Vt. 78; 38 Am. Rep. 659; and it is clearly recognized in our statute (Probate Code, c. 2, sec. 19), which requires that a will shall be attested and subscribed in the testator's presence by two or more competent witnesses. But, if competent at the time of the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proven.

The appellants, however, contend that the attesting witnesses must be such as would be competent under the common-law rule, and that they are impliedly not included in the definition of "witnesses," in General Statutes of 1878, chapter 73, section 6, because their competency is to be determined as of the time of the attestation, and not as of the time when they may be called to testify on the probate of the will. But this construction cannot be upheld. The cases from Massachusetts are not in point, because there the statutes removing the objection to the competency of witnesses on the ground of interest, and of the relation of husband and wife, are expressly declared not to apply to attesting witnesses to a will: *Sullivan v. Sullivan*, 106 Mass. 478; 8 Am. Rep. 356.

The question of the competency of such witnesses in this state is determined by the statute: Gen. Stats. of 1878, c. 73, secs. 6, 7, 9, 10. An attesting witness is competent, if he be one who would at the same time be competent to testify in court to the facts which he attests; and so the courts hold. Thus, in *Jenkins v. Dawes*, 115 Mass. 601, an attesting witness is declared to be one who at the time of the attestation would be competent to testify; and in *Morrill v. Morrill*, 53 Vt. 78, 38 Am. Rep. 659, "competency to testify" must exist at the time of the attestation.

The attestation contemplated the subsequent testimony to the facts attested when the will should be proved. The incompetency of the husband or wife to testify, where either was an interested party at the common law, rose out of the unity of interest and of personal relations. This unity of interest may be removed, and yet, owing to

the unity and confidential nature of their personal relations, the common-law rule in respect to competency remain, on grounds of public policy: *Lucas v. Brooks*, 18 Wall. 453; *Giddings v. Turgeon*, 58 Vt. 110.

It is conceded that the unity of interest, so far as relates to property, has been done away with by statute: *Wilson v. Wilson*, 43 Minn. 400; and the general disqualification to testify on the ground of interest is removed by the General Statutes of 1878, chapter 73, section 7, but it is denied that the statute has removed the general incompetency growing out of the marriage relation. But the only limitation upon the competency of either is found in the General Statutes of 1878, chapter 73, section 10, which provides that neither party shall be examined without the consent of the other. They are not thereby made incompetent witnesses, nor are they to be classed as such, though their right to be examined is contingent upon the consent of that one for or against whom the witnesses may be offered. It does not follow that a married person is incompetent to attest a will because the husband or wife of such person is a beneficiary under the will. He can only become incompetent in a single contingency, and that is, in case such interested party shall become a contestant on the subsequent probate of the will. If the latter be not a contesting party he is in no position to raise the objection, and he may not choose to do it if he is; and, if he be one of the proponents, he thereby consents to the testimony of the attesting witnesses. The contingency which would make him incompetent may never arise, and, if it does, it must be deemed to arise subsequent to the act of attestation. In the case at bar, then, what evidence is there that the witness is incompetent? The wife is proponent, and offers to examine her husband as a witness. No question, therefore, in respect to his competency is raised. Incompetency in a witness is not presumed, and the question is to be determined when the offer to examine the witness is made, and then the facts are to be ascertained by the court. The witness is not shown to be incompetent, in this case, and his evidence on the probate of the will was properly received. In *Tillotson v. Prichard*, 60 Vt. 107, 6 Am. St. Rep. 95, it is held that the wife of the grantor in a Minnesota deed was a competent attesting witness thereto, under the provisions of the statute we have been considering, and the court say "that she was a competent witness, and might be examined with the consent of her husband." The court also held, as we do, that the plaintiff, by offering the deed in evidence, consented to her being a witness.

2. The appellant also contends that if the husband be a competent

witness, then the legacy to his wife should be held void under the statute which annuls beneficial devises, etc., to a subscribing witness on account of the marital relation. But there is nothing in this point. The husband has no direct or certain interest in the legacy to his wife. It is absolutely hers in her own right, and free from his control: *Gen. Stats.* 1878, c. 69; *Wilson v. Wilson*, 43 *Minn.* 400. The only devises or legacies which the statute annuls are those made to subscribing witnesses, which clearly does not apply to the husband or wife of the legatee.

In England, where husband and wife are competent witnesses (*Taylor on Evidence*, 1145, 1147), the statute has gone further (1 *Vict.*, c. 26, sec. 15), and also avoids gifts, legacies, and devises to the husband or wife of an attesting witness. It could not be done without the statute.

This legislation assumes both the competency of the witnesses and that they had no interest in the legacies which would have made the same void without the aid of legislation to that effect.

The construction we have adopted is in conformity with the spirit of modern legislation on the general subject of the rights of husband and wife, and the practical results will no doubt be no more serious than in the case of parents or children, who may unquestionably attest deeds and wills for each other: 1 *Alb. L. J.* 246.

GILLIS v. GILLIS.

96 *Ga.* 1; 51 *Am. St. Rep.* 121; 30 *L. R. A.* 143; 23 *S. E.* 107. (1895)

LUMPKIN, J. * * * The paper purporting to be the will was executed by the testatrix on the twelfth day of March, 1873. It bears the names of four witnesses, but it was conceded that the last of them signed his name some time after the execution of the paper by the testatrix and its attestation by the other witnesses, and it does not appear that he signed in her presence. The appearance, therefore, of the name of this witness upon the paper counts for nothing in determining the question of the legality of its execution. Accordingly, the fact that he signed will be ignored altogether, and it will be understood that, in speaking of the subscribing witnesses to the paper, reference to the other three only is intended. One of these signed by making her mark. Another died before the testatrix. The usual and formal attestation clause

was used. The paper was offered for probate soon after the death of the testatrix, and about twenty years after its execution and attestation. At the time of probate, the two subscribing witnesses then in life were produced. The one who wrote his own name proved the due execution of the paper as a will. The signature of the deceased witness was shown to be in his handwriting. The illiterate witness testified that she had no recollection of attesting the will, and could not swear to the making of her mark. At the same time, however, she did not expressly swear that she did not attest by her mark the paper propounded.

1. The first and leading question is: Was the paper legally attested as a will? The execution and attestation of written wills in this state, as to both real and personal property, is provided for in sections 2414 and 2415 of the code. Section 2414 reads as follows: "All wills (except nuncupative wills) disposing of realty or personalty must be in writing, signed by the party making the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses." Section 2415 declares that: "A witness may attest by his mark, provided he can swear to the same; but one witness cannot subscribe the name of another, even in his presence and by his direction." Section 2414 was codified from section 5 of 29 Charles II, chapter 3, known as the "statute of frauds," in reference to devises of real property (Cobb's Digest, 1128; Huff v. Huff, 41 Ga. 701), and from an act of January 21, 1852 (Acts 1851-52, p. 104), which prescribes that wills bequeathing personal property shall be executed as are wills devising real property. The statute of frauds and our own act of 1852 each uses the word "credible," and section 2414 of the code uses the word "competent," as to the three or more witnesses required to attest a will. These two words are, as here used synonymous: Hall v. Hall, 18 Ga. 40. They mean, in this connection, witnesses who are competent at the time of attestation to testify in a court of justice.

Thus, in one of the earlier English decisions, it was said: "The true time for his credibility is the time of attestation; otherwise, a subsequent infamy, which the testator knows nothing of, would avoid his will": Holdfast on Demise of Anstey v. Dowsing, 2 Strange. 1253. In Sears v. Dillingham, 12 Mass. 358, the court, after stating that an executor was not a competent witness to prove the execution of a will, said: "But a will to which such an executor is a subscribing witness may be proved by the testimony of the other witnesses, he having been a credible witness within the statute at the time of his attestation, and having become incompetent only by accepting a trust." In Patten v.

Tallman, 27 Me. 17, it was said: "The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation." So very pertinent, in this connection, is the text of Schouler on Wills, that we make an extended extract: "Upon common-law principle the qualification or disqualification of a witness is usually raised with reference to the time when he is called upon to testify. Nor is competency at that date to be left unconsidered; as where, for instance, a witness who subscribed while in sound mind has become insane by the time the probate of the will is at issue, in which case, of course, his testimony cannot be taken. But his incompetency at this latter date does not defeat the will, whose attestation and subscription was a sort of testifying, such as the peculiar transaction called for. To surround himself with a specified number of witnesses at that time competent was all that any testator could do in compliance with the statute requirements; and what was then a proper execution in all respects taking place, a will was produced whose validity could never be impeached for informality. Hence the rule, which reason should now pronounce the universal one, so far as the question remains a material one at all, that the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed. If, therefore, a sufficient number of witnesses attest and subscribe properly, who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate. In other words, the inconvenience of this last situation is purely casual and incidental, and without direct prejudice to the will itself, which might, indeed, be established on mere proof of handwriting, where the instrument appeared on its face genuine and formal": Schouler on Wills, secs. 350, 351; Jarman on Wills, Randolph and Talcott's ed., 225; Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666, and note on 680; Hawes v. Humphrey, 9 Pick. 350; 20 Am. Dec. 481, and note on 488; Amory v. Fellows, 5 Mass. 219; Carlton v. Carlton, 40 N. H. 14; Holt's Will, 56 Minn. 33; 45 Am. St. Rep. 434.

A witness who signs by his mark, if so capable of testifying, is just as competent a witness under the statute of frauds, our act of 1852 and section 2414 of the code, as one likewise capable of testifying who writes his own name. This is settled by an unbroken line of authorities: (Citing authorities). * * *

RIGGS v. RIGGS.

135 *Mass.* 238; 46 *Am. Rep.* 464. (1883)

MORTON, C. J. The only question presented by this report is as to the sufficiency of the attestation, by the witnesses to the will and codicil of the testator.

The statutes provide, that in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. Stats., chap. 92, 6; Pub. Stats., chap. 127, 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appears that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aiken v. Weckerly*, 19 Mich. 482, 505; *Downie's Will*, 42 Wis. 66; *Tribe v. Tribe*, 13 Jur. 793; *Jones v. Tuck*, 3 Jones (N. C.) 202; *Graham v. Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit of our statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly if two blind men are in the same room talking together they are in each other's presence. If two men are in the same room conversing together and either or both bandage or close their eyes, they do not cease to be in each other's presence

In England, where the tendency of the courts has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses,

Piercy's Goods, 1 Rob. Ecc. 278; Fincham v. Edwards, 3 Curt. Ecc. 63. It would be against the spirit of our statutes to hold, that because a man is blind or because he is obliged to keep his eyes bandaged, or because by an injury he is prevented from using his sight, he is deprived of the right to make a will.

The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe "in his presence"; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion therefore that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and after the witnesses had signed it, and as a part of the *res gestae*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed.

BEYER v. LE FEVRE.

186 U. S. 114; 46 L. Ed. 1080; 22 Sup. Ct. 765. (1902)

BREWER, J. * * * One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor. * * *

CREIGHTON et al. v. CREIGHTON et al.

261 Fed. 333. (1919)

Appeal from the District Court of the United States for the District of Kansas; JOHN C. POLLOCK, Judge.

Suit in equity by Minnie B. Creighton and another against Margaret Creighton and others. Decree for complainants, and defendants appeal. Reversed.

Before SANBORN, Circuit Judge, and MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. James Creighton, of Washington county, Kan., died January 19, 1916, leaving surviving him his widow, Margaret Creighton, and three children by her, Cyrus Creighton, Margaret Barley, and Alexander Creighton, and two children by a former marriage, Minnie Creighton and Laura A. Owen. This suit was brought by the two children by the former marriage, residents of New Mexico, against the widow and her three children, to annul an instrument purporting to be the last will and testament of James Creighton. It was alleged in the bill of complaint that, at the time of making the will in question, the testator was of unsound mind, and that he was induced to sign it through undue influence of his wife, Margaret Creighton.

These two questions were submitted to a jury, who found, from the

testimony and under the instructions of the court, that James Creighton was of sound mind at the time he made the will, but that the will was made through the undue influence of his wife. Upon that verdict a decree was entered setting aside the will. The appellants contend that the evidence is not sufficient to sustain the finding of the jury, nor the decree based thereon.

Beatrice, the mother of appellees, obtained a divorce from her husband, James Creighton, April 9, 1884. There was decreed to her as alimony 160 acres of land and \$1,500 in money. The custody and control of the children by that marriage were by the terms of the decree left to the father and mother as the children might choose. There were three children at that time. In November, 1884, James Creighton married appellant, Margaret Creighton. Not long after this marriage, all three of the children by the first wife took up their permanent abode with their mother. Later the mother and the three children moved to New Mexico.

James Creighton made a will on June 17, 1905, in which each of the appellees, Minnie B. Creighton and Laura A. Owen, were given \$1 each, and the daughter, Lucy, by the former wife, was given \$100. Later Lucy died. On the 12th of June, 1912, James Creighton, after a visit by him and Margaret Creighton to appellees in New Mexico, made a will in which he gave one-half of his property to his wife, and after making a bequest of \$400 to one Beatrice Hamilton, gave the remainder of his property in equal parts to his five children then living. On September 3, 1912, he made the will now in controversy, which is the same as the will of June 17, 1905, except that it gives to each of the appellees the sum of \$1,000 and leaves out the bequest of \$100 to Lucy.

There is no direct testimony that James Creighton was unduly influenced. The jury must have based their findings on inference. It was clearly shown by the testimony that the wife did have an influence on her husband, that he had an irascible disposition, and that she could mollify him in his fits of temper. One of the witnesses for the contestants testified as follows:

"I considered Mrs. Creighton very kind to the old gentleman. Sometimes he was a little cranky, got a little off his base, as I called it, and she would look up into his face and smile, and it was all over with the old man. It just seemed as if that smile and that hand on his shoulder just took the savage all out of the old gentleman."

Another witness for contestants testified as follows:

"Q. Describe her treatment of the old gentleman to the jury. A. She was very kind to the old gentleman; treated him nice."

"Q. How did she express her kindness? A. In a general, kindly way, being good to him and seeing nothing crossed the old gentleman and irritated him.

"Q. If anything did cross him or irritate him, what did she do? How did she get him out of it? A. She would be nice to him.

"Q. How would she be nice to him? What would she do? A. When they had the trouble out there, the lady came out and took him to the house.

"Q. What do you mean by taking him to the house? A. She put her arm around him and said, 'Come on, Father; don't bother about this.'

"Q. Put her arm around his neck? A. Yes, sir.

"Q. Did you see her do that more than once? A. Did I see her do it more than once? I did see her do it once."

(1) "To constitute undue influence, the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily, and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy his free agency, and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence; neither does solicitation, unless the testator is so worn out with importunities that his will gives way." *In re Tyner*, 97 Minn. 181, 106 N. W. 898.

"The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property." *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Sanger v. McDonald*, 87 Ark. 148, 157, 112 S. W. 365.

(2) "Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induced the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made." *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.

(3) Testimony was introduced to the effect that James Creighton criticized his son Cyrus for building a barn that the father considered

was unnecessarily expensive. It was shown, however, that the barn was afterwards completed, and that the expense of construction was paid by the father. This incident is taken by counsel for contestants as indicating an estrangement between the father and son. If this alleged difference had come about because the son was wayward, improvident, indolent, or careless, there might be some ground for such an inference; but the evidence is that the son was industrious, capable, intelligent, and dependable. It appears from the testimony that the son, through the training he had received at the University of Kansas, had ideas that were somewhat different from those entertained by his father. Those ideas do not appear to discredit the son. On the other hand, they appear to have been to his credit, and that the father, under a grumbling and fault-finding exterior, was really proud of his son's initiative, industry, and efficiency. The testimony clearly shows that at the time of the making of the will he was in good health and spirits. No inference of undue influence on the part of Margaret Creighton can be drawn, except by a strained and unnatural construction of the testimony. All the testimony tends to show that she was kind, considerate, dutiful, and patient. The substance of the contention of appellees is that this conduct on her part was due solely to craft and cunning. The testimony does not warrant such an inference, nor does it sustain the finding that the will of September 3, 1912, was made through undue influence on her part.

This case will therefore be reversed, with directions to dismiss the bill.

TRICE v. SHIPTON.

113 Ky. 102; 101 Am. St. Rep. 351; 67 S. W. 377. (1902)

DU RELLE, J. A paper propounded as the last will of S. D. Trice, whereby he gave all his property to his wife, was duly probated in 1896. The widow subsequently remarried and died, and after her death, and some three years after the probate, an appeal was taken from the judgment of probate by Trice's heirs. The grounds of the contest were lack of mental capacity and undue influence, and the jury seems to have been properly instructed on these questions. They found in favor of the will.

Evidence was introduced that, a short time before the testator died, he said that he had made a will, and his wife said that that will was

destroyed; that he then stated that he wanted his property to go to his wife, with remainder to his family; that he had spoken of his will as having been destroyed. Another witness testified that, some three years before his death, she asked him if he had made a will, and he replied that he had no will; that he had made one, but it was destroyed; and his wife confirmed the statement that it was destroyed. Upon this testimony an instruction was asked as follows: "Even if the jury believe from the evidence that the paper in question was freely executed by S. D. Trice, yet if they further believe from the evidence that he afterward wished and intended to destroy said paper, and that his wife, to prevent it, represented to him that said paper was destroyed, and, he relying upon that representation, was prevented from destroying said paper or making another as his will, this is such undue influence and fraud as renders said paper invalid, and the jury will find said paper not to be his will." It is argued with considerable force that this evidence tended to show a fraud upon the testator, and that by the direct fraud of his wife he was made to believe his will had been destroyed, and thereby prevented from revoking it by himself destroying it, as he desired and intended; that this fraud can, in probate proceedings, be shown as the basis for a verdict setting aside the will on the ground of fraud, on behalf of the heirs at law. On the other hand, it may be urged that such statements are sometimes falsely made by testators to avoid annoyance from their kindred, and that, even if the statements of which testimony has been given be admitted to show a desire for the destruction or revocation of his will, it does not at all follow that if he had known the will was still in existence he would have actually destroyed or revoked it. But we do not think there was any question to submit to the jury. The statute (Kentucky Stats., sec. 4833) seems directly to provide the mode whereby a will may be revoked, in whole or in part, and to peremptorily prohibit any other mode of accomplishing this purpose: "No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke." In *Toebbe v. Williams*, 80 Ky. 665, 4 Ky. Law. Rep. 563, in an opinion by Chief Justice Hargis, it was said, referring to section 10, chapter 113 of the General Statutes, which is substantially re-enacted in the section we have quoted. "Evidence of verbal state-

ments made by the testator, after making his will according to the forms of law, to the effect that he has not made a will do not constitute a revocation, and possess but little value, and when permitted to go to the jury they should be instructed that such statements do not tend to prove revocation, and furnish no light in construing the written acts of the testator." In *Gains v. Gains*, 2 A. K. Marsh, 190, 12 Am. Dec. 375, a case was unmistakably made out of the forcible prevention by the devisee of the destruction of a will by the testator. The devisee snatched it from his hand and forcibly retained it after the testator had sent for it with the announced desire to destroy it. It is true that, in that case the court held the testator's mind was at the time so impaired by disease as to render him incapable of acting efficiently for the purpose of revocation. But the court said, in an opinion by Chief Justice Boyle: "But, admitting the competency of the testator, at the time, to have revoked his will, and that he was prevented from doing so by the conduct of the defendant in error, we should still think that the will was not thereby revoked. The act concerning wills, after having prescribed the manner in which a will shall be made, provides 'that no devise, so made, or any clause thereof, shall be revocable but by the testator's or testatrix's destroying, canceling or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing, made as aforesaid.' None of these acts were done, and we cannot, under any circumstances, substitute the intention to do the act for the act itself. Construction is admissible only where there is ambiguity; and there is no ambiguity in the provision referred to. To substitute the intention to do the act, instead of the act itself, without which the statute expressly declares the will shall not be revocable, would be changing the law, not expounding it. A devisee who, by fraud or force, prevents the revocation of a will, may, in a court of equity, be considered a trustee for those who would be entitled to the estate, in case it were revoked; but the question cannot with propriety be made in a case of this kind, where the application is to admit the will to record." In *Runkle v. Gates*, 11 Ind. 95, a similar question was presented, with the same result, the fraud in that case having been confessed by the devisee: See, also, *Jarman on Wills*, c. 7, sec. 2.

The law has pointed out the mode in which wills may be revoked. It has, in effect, forbidden any mode of revocation save that permitted by the statute. The courts cannot substitute for the plain requirement of the statute the supposed desire, intention, or even the unaccomplished attempt, of the testator to destroy his will. If a testator on his

deathbed should send for his will for the avowed purpose of its destruction, and should die before it reached him, or even with the instrument in his hands for that purpose, it could hardly be maintained that a revocation had been accomplished, within the meaning of the statute. To hold that an expressed intention to destroy a will, or an expressed belief that it had been destroyed—and that such intention or belief can be proven by statements made, very possibly, for the purpose of misleading the kindred of the testator—could take the place of the formal and definite revocation provided for by the law, would violate the plain letter and spirit of the statute and create an open door for fraud.

The testimony objected to does not seem to be such as could have operated prejudicially. For the reasons given, the judgment is affirmed.

WHITE v. CASTEN.

1 *Jones' Law*, 197; 59 *Am. Dec.* 585. (1853)

NASH, C. J. The question for our consideration arises under the act of the general assembly concerning the revocation of wills: R. S., c. 122, sec. 12. By that section, it is provided "that no devise in writing, etc., or any clause thereof, shall be revocable, otherwise than by some other will in writing, or by burning, canceling, tearing, or otherwise obliterating the same," etc. This provision is almost in the exact terms of the statute of frauds in England, passed 29 Charles II. It was stated at the bar, in the argument here, that the true construction of the 29 Charles, upon the question raised here, was in England still unsettled, and that there was no adjudication by this court which was a direct authority. This is so, and we must endeavor to extract from the conflicting English authorities, and our own cases which have a bearing upon the question, that rule which appears to us most consonant with the statute and to reason. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation. No act of spoliation or destruction of the instrument will, under the statute, revoke it, unless deliberately done, *animo revocandi*. Thus if a testator, intending to destroy papers of no value, ignorantly and without an intention to do so, throws his will into the fire, and it is consumed, or by accident tears off the seal, it is no revocation. The difficulty lies in ascertaining how far the symbol of revocation must

extend. As to the burning, must the will by it be literally destroyed, in whole or in part? or must any portion of it be actually destroyed? It is upon this point that the English cases differ. The first case to which our attention was directed was that of *Bibb d. Mole v. Thomas*, 2 W. Black. 1043. The case was: Palin, the deceased, being sick in bed, near the fire, ordered his attendant, Mary Wilson, to bring him his will, which she did. He opened it, looked at it, and tore a bit of it almost off, then crumpled it in his hand and threw it on the fire. It fell off, and Mary Wilson took it up and put it in her pocket. Palin did not see her take it up, but had some suspicion of the fact, as he asked her what she was at, to which she made little or no reply. The court ruled that it was not necessary that the will or the instrument should be literally destroyed or consumed, buried or torn to pieces. Throwing it on the fire with an intent to burn, though it is but very slightly singed, and falls off, is sufficient within the statute.

The case does not inform us to what extent the fire had made an impression on the paper; it must have been very slight. The authority of this case is said to be shaken by what fell from Chief Justice Denman, in the case of *Doe d. Reed v. Harris*, 33 Eng. Com. L. 129. In commenting on the case of *Bibb d. Mole v. Thomas*, *supra*, he observes: "Doubt might be entertained now whether the proof there given would be sufficient as to these"—meaning burning and tearing. High as this authority is, we are not inclined from the expression of a doubt to set aside the deliberate and united opinions of Chief Justice De Grey, Gould, Blackstone, and Nares. But in that very case, both Patteson and Coleridge stated there must be a partial burning of the instrument itself, and that any partial burning will destroy it entirely. But independently of this, the case of *Bibb d. Mole v. Thomas*, *supra*, is recognized by writers of the highest authority. Mr. Powell, at page 596 of his treatise of devises, says: "Upon this principle, it has been held that if any of these acts, viz., tearing, burning, etc., be performed in the slightest manner, this, joined with a declared intent, will be a good revocation, because the change of intent is the substantive act, the fact done is only the sign or symbol by which that intent is rendered more obvious." He then cites the case of *Bibb d. Mole v. Thomas*, *supra*, as his authority. See also 1 Jarman on Wills, 115-119; Lovelace on Wills, 347. They both cite the case from Sir William Blackstone, and refer to the case of *Doe d. Reed v. Harris*, *supra*, as showing that the singeing of the cover of a will is not a burning of the will, but that there must be a partial burning of the will itself. Thus stand the cases in England on this question, and upon the authority of

Bibb d. Mole v. Thomas, *supra*, Judge Kent, in the fourth volume of his Commentaries, page 532, says: "Canceling in the slightest degree, with a declared intent, will be a sufficient revocation, and therefore throwing a will on the fire with an intent to burn it, though it be but slightly singed, is sufficient evidence of the intent to revoke;" and for this he cites Bibb d. Mole v. Thomas, *supra*. So Greenleaf, in his first volume on evidence, page 349, states that when a testator crumpled his will and threw it on the fire with an intent to destroy it, though it was saved entire without his knowledge, it would be a revocation, and refers to the case of Bibb d. Mole v. Thomas, *supra*, to sustain them. See Card v. Grinman, 5 Conn. 168.

By a large majority of these authorities, it appears that the case in Blackstone is sustained and approved. The intent with which the act is done by the testator must continue through the act; otherwise it will not be a revocation; as where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and after being appeased fitted the pieces together and expressed his satisfaction that it was no worse, it was held to be no revocation. Here the intent to revoke was itself revoked before the act was complete: Doe v. Perkes, 3 Barn. & Ald. 489. The case of Hise v. Fincher, 10 Ired. L. 139 (51 Am. Dec. 383), which was referred to, does not govern this. There the testator, who was sick in bed, directed his son to throw his will into the fire; instead of doing so, he, without his father's knowledge, threw another paper in. This was adjudged, and certainly very correctly, to be no revocation. The directions given were accompanied by no act or symbol on the part of the testator expressive of his intention to revoke: his intention rested only in words.

The principle which we would extract from the cases cited is that where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burned or singed it is sufficient to revoke the will. Let us now try this case by this principle or rule.

The case states that the testator threw the will into the fire with the intent to revoke and destroy it; that after he had done so he turned away, when the plaintiff, his wife, took the paper from the fire secretly, and concealed it in her pocket, that the testator up to his death thought the will was destroyed, and so frequently expressed himself. The writing was upon a single sheet of paper, which was burned through in three places, one near either extremity, and in the crease formed by

the folding of the paper. It was also singed at the outer edges, and scorched on the outside or back; this was done when the paper was thrown on the fire. No word or letter of the writing was in any manner destroyed or obliterated by the burning, and the paper itself but little disfigured, and in no wise injured, except as above stated.

It will be at once seen that this is a stronger case than that of *Bibb d. Mole v. Thomas, supra*. There the script was barely singed; here it is burned through in three different places, the outside scorched, and the edges of the paper singed. We are therefore clearly of opinion that the will was revoked; there was the present intent to revoke—the act of throwing on the fire with that view, and the symbol impressed upon the script itself. There was no halting in the intention of the testator between the commencement and the completion of the act; for, to the time of his death, he believed the will was destroyed.

It is seen from the cases cited and the rule we have laid down, that the much or little of the burning of the script is not material, and when the reason of requiring the symbol to be impressed on the script is considered, it cannot be important. The symbol is nothing but the act showing the intention of the testator, and when that appears on the paper, the evidence from the act is complete, and the testator has completed his intention. It would be singular that if the slightest burning of a house, on an indictment for arson, should be sufficient to take the life of the incendiary, as it is, that a similar burning should not, in a civil case, be sufficient to revoke a will. The language upon this point in the act taking away the benefit of clergy for burning a jail or other public building is the same as in the act we are considering, R. S., c. 34, sec. 7: "If any person shall willfully and maliciously burn," etc. If any portion of the building is burned, it is sufficient to bring the case within the statute.

CHAPTER XXVI.

ADVERSE POSSESSION.

- Section 1. Nature of Title Acquired.
- Section 2. Tacking Possession of Successive Claimants.
- Section 3. Disabilities.
- Section 4. Nature of Possession.

SEC. 1. NATURE OF TITLE ACQUIRED.

SHARON v. TUCKER.

144 U. S. 533; 36 L. Ed. 532; 12 Sup. Ct. 720. (1892)

This is a suit in equity to establish, as matter of record, the title of the complainants to certain real property in the city of Washington, constituting a part of square No. 151, and to enjoin the defendants from asserting title to the same premises as heirs of the former owner.

The facts which give rise to it, briefly stated, are as follows: In 1828, Thomas Tudor Tucker died, seised of the premises in controversy. He had, at one time, held the office of treasurer of the United States and resided in Washington, but at the time of his death he was a resident of South Carolina. The property did not pass under his will, but descended to his heirs at law. It does not appear that after his death any of the heirs took possession of the property, or assumed to exercise any control over it. In 1837 the square was sold for delinquent taxes assessed by the city against "the heirs of Thomas T. Tucker," and was purchased by Joseph Abbott, then a resident of the city. The taxes amounted to \$38.76, and the sum bid by the purchaser was \$250. In 1840 a tax-deed, in conformity with the sale, was made to Abbott, purporting to convey to him a complete title to the square. It is admitted that the deed was invalid for want of some of the essential preliminaries in assessing the property, and in advertising it for sale. It does not appear, however, that the purchaser had any knowledge of this invalidity. Early in the following year, 1841, he took possession of the square, and inclosed it with a board fence and

a ditch with a hedge planted on one side of it. It was a substantial inclosure, sufficient to turn stock and keep them away. He was a stable-keeper, and, in connection with this business, cultivated the ground and raised crops upon it in 1841. From the time he took possession until 1854 the square was inclosed, and each season it was cultivated. In 1854 he leased the square to one Becket for the period of 10 years at a yearly rent of \$100. Becket took possession under his lease, and kept the ground substantially inclosed, and he occupied and cultivated it from that time up to 1862. In the fall of that year, soldiers of the United States, returning from the campaign in Virginia, were encamped upon the square; and, as it appears, they committed such depredations upon the fence, buildings, and crops that the lessee was obliged to abandon its cultivation. Abbott died in April, 1861, and by his will devised the square to his widow. In August, 1863, she sold and conveyed it to one Perry; and he kept a man in charge of the same, who lived in a small building which Becket had built and occupied during his lease of the premises under Abbott. In 1868 Perry sold the entire square to Henry A. Willard for the consideration of \$17,600. He divided the square into small lots for buildings for residences, and upon one side of the square, fronting on T street, erected 12 substantial dwelling-houses, which have been since occupied up to the commencement of this suit. In 1872 Willard sold and conveyed a portion of the square, the premises in controversy, to J. M. Latta, trustee, for a valuable consideration; and from him the title has passed by regular conveyances to the complainants herein. From 1840 to 1863 the square was chiefly valuable for agricultural purposes; but since then, and especially of late years, its only value has been for buildings as residences, and has been so regarded by its owners. From 1840 up to the present time the taxes upon the property have been paid by Abbott and his successors in interest. None of the heirs of Mr. Tucker, nor anyone claiming under the heirs, has paid or offered to pay any taxes assessed on the property; nor since that date, up to the commencement of these suits, have any of the defendants therein, or their predecessors in interest, asserted any claim to the property or interest in it, or attempted in any way to interfere with its possession or control. Soon after the sale to Perry, in 1863, the tax-deed was passed upon by eminent counsel in the District,—the late Richard S. Coxe and James M. Carlisle,—and the title by it was pronounced by them to be indisputable. It was only a short time before the institution of this suit that the invalidity of the tax-deed as a source of title was ascertained. A desire to dispose of the property led the complain-

ants to have an investigation made, and an abstract of title obtained. It was then discovered that they could not obtain any abstract of title which purchasers would accept, in consequence of certain defects in the assessment of the taxes, under which the sale was made and the deed to Abbott was executed. They were consequently embarrassed and defeated in their efforts to dispose of the property. To remove this embarrassment, this suit was accordingly brought by the complainants to obtain a judicial determination of the validity of their title, and an injunction against the defendants claiming under the previous owner.

There was no substantial disagreement between the parties as to the facts, but the defendants insisted and relied solely upon the ground that a court of equity could afford no relief to the complainants, because they were not at the commencement of the suit in actual possession of the premises.

The court below, at special term, sustained this view, and entered a decree dismissing the bill. At general term it affirmed that decree, and to review this last decree the case is brought here by appeal.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The title of the complainants is founded upon the adverse possession of themselves and parties through whom they derive their interests, under claim and color of title, for a period exceeding the statutory time which bars an action for the recovery of land within the District of Columbia. The statute of limitation to such cases in force in the District is that of 21 James I., c. 16. That statute passed "for quieting of men's estates and avoiding of suits," among other things, declared that no person or persons should at any time thereafter make any entry into any lands, tenements, or hereditaments but within 20 years next after his or their right or title shall thereafter have first descended or accrued to the same, and that in default thereof such persons not entering, and their heirs, should be utterly excluded and debarred from such entry thereafter to be made, any former law or statute to the contrary notwithstanding.

Twenty years is therefore the period limited for entry upon any lands within this District after the claimant's title has accrued. After the lapse of that period, there is no right of entry upon lands against the party in possession, and all actions to enforce any such alleged right are barred. Complete possession, the character of which is hereafter stated, of real property in the District for that period, with a claim of ownership, operates, therefore, to give the occupant title to

the premises. No one else, with certain exceptions,—as infants, married women, lunatics, and persons imprisoned or beyond the seas, who may bring their action within 10 years after the expiration of their disability,—can call his title in question. He can stand on his adverse possession as fully as if he had always held the undisputed title of record.

The decisions of the courts have determined the character of the possession which will thus bar the right of the former owner to recover real property. It must be an open, visible, continuous, and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others; but adversely to all titles and all claimants. In the present cases the adverse possession of the grantors of the complainants, sufficient to bar the right of previous owners, is abundantly established, within the most strict definition of that term.

The objection of the defendants to the jurisdiction of a court of equity in this case arises from confounding it with a bill of peace and an ordinary bill *quia timet*, to neither of which classes does it belong, nor is it governed by the same principles. Bills of peace are of two kinds: First, Those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery asserted by one party, and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere and bring all the claimants before it in one proceeding to avoid a multiplicity of suits. A separate action at law, with a single claimant, would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each claimant might lead to interminable litigation. To put at rest the controversy, and determine the extent of the rights of the claimants of distinct interests in a common subject, the bill lies, which is thus essentially one for peace. Second. Bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. "The equity of the plaintiff in such cases arose," as we said in *Holland v. Challen*, 110 U. S. 15, 19, 3 Sup. Ct. Rep. 495, "from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery

in one action constituted no bar to another similar action, or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation, and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation, and the irreparable mischief which it entailed. *Adams Eq. 202; Pom. Eq. Jur. 248; Stark v. Starr, 6 Wall. 402; Curtis v. Sutter, 15 Cal. 259; Shepley v. Rangely, 2 Ware, 242; Devonsher v. Newenham, 2 Sch. & L. 199.* It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought that proof of the complainant's actual possession is necessary to maintain the suit. *Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. Rep. 1129.*

There is no controversy such as here stated in the present case. The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record,—that is, by a judicial determination of its validity,—and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost, by the adverse possession of the parties through whom the complainants claim. The title by adverse possession, of course, rests on the recollection of witnesses; and, by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place. Embarrassments in the use of the property by the present owners will be thus removed. Actual possession of the property by the complainants is not essential to maintain a suit to obtain in this way record evidence of their title, to which they can refer in their efforts to dispose of the property. * * *

SEC. 2. TACKING POSSESSION OF SUCCESSIVE CLAIMANTS.

WISHART v. McKNIGHT.

178 Mass. 356; 59 N. E. 1028; 86 Am. St. Rep. 486. (1901)

LORING, J. It appears from the photograph and plan made a part of the bill of exceptions that the demanded premises consist of a strip of land ten feet wide between the dwelling-houses of the demandant and of the tenant, running from Pond Court, on which those houses front, to the rear line of the lots; that the rear of the *locus* is covered by a barn, used and occupied by the tenant, which is in part on the *locus* and in part on the land to which the tenant, without question, has a good title; and further, that the tenant's only access by wagon to the barn is over the *locus*, his dwelling-house being within three and a half feet of the other—that is, the westerly—side line of his lot. From the deeds put in evidence, it appeared that the record title to the *locus* was in the demandant. The tenant introduced in evidence various deeds covering the land on which his dwelling-house stands, but not covering the ten foot strip in question, the first of these deeds being dated January, 1874; he offered to show that for twenty years prior to the date of the writ, July 20, 1897, each of the grantees in said deeds had occupied the demanded premises, and had maintained a fence inclosing them as part and parcel of the premises and dwelling-house occupied by them. It was admitted that no one of these grantees had occupied the *locus* for a continuous period of twenty years, and that the *locus* was not covered by the description of the land contained in any of these deeds. This evidence was excluded, against the exception of the tenant, and the court found for the demandant. This evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession.

The ruling in the court below evidently was made on the authority of *Sawyer v. Kendall*, 10 Cush. 241, following *dicta* in the previous cases of *Ward v. Bartholomew*, 6 Pick. 409, 415, *Allen v. Holton*, 20 Pick. 458, 465, *Melvin v. Proprietors of Locks etc.*, 5 Met. 15, 32, 38 Am. Dec. 384, and *Wade v. Lindsey*, 6 Met. 407, 413, cited in that case.

Where possession has been actually, and in each instance, transferred by the one in possession to his successors, the owner of the record title is barred from maintaining an action to recover the land.

In some cases this conclusion has been reached on the ground that in such a case there is the necessary privity or continuity of possession between the successive trespassers within the doctrine on which *Sawyer v. Kendall*, 10 Cush. 241, was decided; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Smith v. Chapin*, 31 Conn. 530; *Schrack v. Zubler*, 34 Pa. St. 38; *Chilton v. Wilson*, 9 Humph. 399, 405; *Vandall v. St. Martin*, 42 Minn. 163, 44 N. W. 525; *Crispen v. Hannavan*, 50 Mo. 536; *Adkins v. Tomlinson*, 121 Mo. 487, 494, 26 S. W. 573; *Coogler v. Rogers*, 25 Fla. 853, 882, 7 South. 391; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Shuffleton v. Nelson*, 2 Saw. 540, Fed. Cas. No. 12,822; *Winn v. Wilhite*, 5 J. J. Marsh, 521, 524.

There are other cases which reach the same result by a different road. These cases go on the ground that the position of a tenant, who seeks to make out the defense of the statute of limitations by proving the possession of a succession of persons, is not like that of one who seeks to establish an easement by showing that a succession of persons had prescribed for it. These cases hold that in case of the defense of the statute of limitations the only question is, whether the demandant has been kept out of possession continuously for the legal time, not whether the persons who kept him out of possession held one under the other: *Carter v. Barnard*, 13 Q. B. 945, 952; *Dixon v. Gayfere*, 17 Beav. 421, 430; *Willies v. Howe*, (1893) 2 Ch. 545, 553; *Fanning v. Willcox*, 3 Day, 258; *McNeely v. Langan*, 22 Ohio St. 32; *Shannon v. Kinny*, 1 A. K. Marsh, 3, 10 Am. Dec. 705; *Scheetz v. Fitzwater*, 5 Pa. St. 126. And see *Chapin v. Freeland*, 142 Mass. 383, 387, 56 Am. Rep. 701, 8 N. E. 128; *Harrison v. Dolan*, 172 Mass. 395, 397, 52 N. E. 513.

Where possession of land has been held for the statutory period by successive disseisors or trespassers, the defense of the statute is not made out if the possession has not been continuous, because where a disseisor in fact abandons his possession, and leaves the land vacant, the seisin of the true owner reverts; there is a new departure from that time, and the owner can rely on his new seisin by reverter as the ground of an action within the statutory period: *Agency Co. v. Short*, 13 App. Cas. 793; *Solling v. Broughton*, (1893) App. Cas. 556, 561; *Cunningham v. Patton*, 6 Pa. St. 355, 358, 359; *Louisville etc. R. R. Co. v. Philyaw*, 88 Ala. 264, 268, 6 South. 837; *Jarrett v. Stevens*, 36 W. Va. 445, 450, 15 S. E. 177.

In *Sawyer v. Kendall*, 10 Cush. 241, the lot in controversy had been set off to the grantor of the demandant, and the lot next to it to the

tenant, in the partition of their father's estate made by commissioners duly appointed. The premises in controversy and the parcel of land set to the tenant were then inclosed by one fence, and so remained until the lot in controversy was conveyed to the demandant. He put up a fence between the two lots and brought the writ of entry to recover possession of his lot in the same month in which it was conveyed to him—namely, in March, 1848. Both lots “were mostly used as pasture land, and were approached in two ways, both of which led across the latter (the demanded premises). The tenant proved that during the life of her husband the premises in dispute, and the parcel set to her, had been used by him, and since his death by her, by turning cattle into the parcel set to the tenant; and that they thence went into and depastured the tract in controversy. It also appeared that the tenant had gathered apples from the trees on the latter place, and driven cattle over and across the same. This use, as aforesaid, was exercised by the husband of the tenant from 1820 till 1832, and from that time till the date of the writ, by the tenant herself, more than thirty years in the whole.”

Sawyer v. Kendall, 10 Cush. 241, therefore, was a case where no continuity of possession had been made out by the tenant, and the decision was finally put upon that ground. After stating that during her coverture the tenant could commit no act of disseisin, and that until the death of her husband he was in possession by his own act of disseisin, the opinion is as follows: “She shows no deed or devise of the land to herself by her husband. Upon his death, therefore, the seisin was in his heir at law, or the seisin of the true owner revived, and the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband.”

It would be going very far to hold that the possession of the husband and that of his wife after his decease were continuous, where the only act relied on to make out adverse possession consists in turning out on the tenant's land cows which stray thence on to the land in controversy—there being no fence between the two—supplemented by an occasional gathering of apples from the demandant's land. *Sawyer v. Kendall*, 10 Cush. 241, went no farther than that.

We are of opinion that that case is to be confined to the point actually decided, and cannot be held to be an authority for all the statements in the opinions in that case and in the cases cited.

Where a trespasser in possession of land actually transfers his possession to another, or where one disseisor is disseised by another, it is not true, as was held in *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas.

No. 11,347, that there is in contemplation of law of necessity a momentary reverter of seisin to the true owner, for the reason that a trespasser or a disseisor has nothing which he can transfer to another. *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347, was a decision of the circuit court of the United States sitting to try an action of ejectment to recover land in the state of Pennsylvania; the decision was promptly repudiated by the supreme court of that state in *Overfield v. Christie*, 7 Serg. & R. 173, and had ceased to be an authority when first cited in this commonwealth in *Allen v. Holton*, 20 Pick. 458. See, also, the subsequent cases of *Scheetz v. Fitzwater*, 5 Pa. St. 126, 131; *Moore v. Small*, 9 Pa. St. 194, 196. It is settled that one who has the possession of land is thereby invested with a right to that land which, in the absence of a better title, will be enforced by law: *Slater v. Rawson*, 6 Met. 439; *Hubbard v. Little*, 9 Cush. 475; *Currier v. Gale*, 9 Allen, 522; *Pollock and Wright on Possession*, 95-98; and this possession and the right arising out of it may be transferred *in pais* to another.

SEC. 3. DISABILITIES.

HARRIS v. McGOVERN.

99 U. S. 161; 25 L. Ed. 317. (1878)

MR. JUSTICE CLIFFORD delivered the opinion of the court:

Actual title to the lot in controversy is claimed by the plaintiff as devisees and heirs of Stephen Harris, deceased, by virtue of an ordinance of the city, which, as they allege, was subsequently ratified by an act of Congress. Opposed to that, the theory of the defendants is that the city ordinance granted the lot to Stephen A. Harris, under whom they derive title, and that inasmuch as they have been in the open adverse possession of the same, claiming title, for more than five years, the title of the plaintiffs, if any they or their testator ever had, is barred by the Statute of Limitations.

Possession being in the defendants, the plaintiffs brought ejectment, and the defendants appeared and pleaded as follows: 1. The general issue. 2. That they were seised in fee simple of the premises. 3. That the title and right of possession of the plaintiffs were barred by the Statute of Limitations.

Pursuant to the act of Congress, the parties waived a jury and submitted the evidence to the court. Special findings were filed by the judge presiding, with his conclusions of law, as exhibited in the record. Hearing was had, and the court rendered judgment in favor of the defendants, and the plaintiffs sued out the present writ of error.

Three errors are assigned, as follows: 1. That the court erred in the conclusion of law that the Statute of Limitations began to run as early as July 1, 1864, as found in their first conclusion of law. 2. That the court erred in the conclusion that the defendants were in possession of the premises for more than five years subsequent to the time when the Statute of Limitations commenced to run. 3. That the court erred in their fourth conclusion of law, that the defendants were entitled to judgment.

Actions of the kind cannot be maintained in that State, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within five years before the commencement of such action. Stats. Cal. 1863, 326; 2 Code, sect. 318.

From the findings of the Circuit Court it appears that the lot in controversy is within the corporate limits of the city, and that it is situated west of Larkin Street and northwest of Johnson Street, as they existed prior to the passage of the ordinances, which were afterwards ratified by the act of the legislature of the State. Stats. Cal. 1858, 53. Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to the city and its successors. 13 Stat. 333, sect. 5.

Prior to the incorporation of San Francisco the locality was known as the pueblo or town by that name; and the findings of the court show that on Sept. 25, 1848, the alcalde of the pueblo made a grant in due form of the land in controversy to a party designated in the instrument by the name of Stephen A. Harris, which grant was duly recorded in the official book of records kept for that purpose; that at that date there was a man residing in that pueblo by the name of Stephen A. Harris and another man by the name of Stephen Harris; that the grant was intended for and delivered to the latter and not to Stephen A. Harris; and that Stephen Harris, to whom the grant was delivered, acquired all the title that passed or was conveyed by the grant of the alcalde. It also appears that Stephen Harris, two years later, left California, and that he never returned to that State; that he went to New Jersey, where he remained for several years, and then removed to Illinois, where, on the 5th of November, 1867, he died,

leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children.

By the fifth finding of the court it appears that there was no evidence introduced tending to show that the deceased, or the plaintiffs, or any person claiming through or under them, ever improved the land, or was ever in the actual possession or occupation of the land or any part of the same. On the other hand, it appears that Stephen A. Harris, May 1, 1854, conveyed the land to the person named in the sixth finding, by deed in due form, which was duly recorded, and that all the right, title, and interest thus acquired by the grantee by sundry *mesne* conveyances subsequently vested in the defendants for a valuable consideration, without notice of the claim of the plaintiffs or their testator.

There was no evidence to show that any party was in actual occupation of the land Jan. 1, 1855, or any time between that date and the first day of July of the same year; but the seventh finding of the court shows that one of the grantors of the defendants, in the spring of 1864, took actual possession of the land, claiming title under one of the said *mesne* conveyances, and that he fenced and occupied the lands, and that he and his several grantees, including the defendants, have since that time to the present been in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith against all the world, under the said several *mesne* conveyances.

Sect. 5 of the act of Congress of July 1, 1864, relinquished to the city all the right and title of the United States to the lands within the corporate limits of the city, as defined in the act of incorporation passed by the State legislature, and of course the title of the city to those lands became absolute on that day. *Lynch v. Bernal*, 9 Wall. 316; *Montgomery v. Bevans*, 1 Sawyer, 653; 13 Stat. 333.

Infancy is not set up in this case, and if it were, it could not avail the plaintiffs, as the ninth finding of the court shows that the minor plaintiffs arrived at full age more than a year before the suit was commenced.

Lands lying west of Larkin Street and southwest of Johnson Street were relinquished to the possessors, subject to the right of the city to take possession of the same if wanted for public purposes, without compensation; but the lot in controversy is not within that reservation, as the first finding of the court shows that it is situated northwest of Johnson Street.

Appended to the findings of fact are the conclusion of law pronounced by the Circuit Court. They are as follows: 1. That the

adverse possession of the grantors of the defendants commenced in the spring of 1864, and that the Statute of Limitations began to run as early at least as the first day of July of that year, when the title of the city to the municipal lands within its boundaries became perfect under the act of Congress, to which reference has already been made.

Authorities to show that the facts stated in the seventh finding of the court amount to an adverse possession of the lot in controversy, within the meaning of the State statute, are quite unnecessary, as the proposition is too plain for argument. *Angell, Limitations* (6th ed.), sect. 394; *Green v. Lister*, 8 Cranch, 229.

Cases frequently arise where the property is so situated as not to admit of use or residence, and in such cases neither actual occupation, cultivation, nor residence are absolutely necessary to constitute legal possession, if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Ewing v. Burnet*, 11 Pet. 41; *Jackson v. Howe*, 14 Johns. N. Y. 405; *Arrington v. Liscom*, 34 Cal. 365; *Proprietors of the Kennebec Purchase v. Skinner*, 4 Mass. 416.

Apply the rule to the case which the foregoing authorities establish, and it is clear that the first conclusion of law adopted by the Circuit Court is correct, as the seventh finding of facts shows that the defendants, from the date of the act of Congress confirming the title of the city to her municipal land to the date of the judgment, were in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith, against all the world, which is certainly a bar to the plaintiffs' right of action under the statute of the State.

Nor is there any valid objection to the second conclusion of law adopted by the Circuit Court, which was that the cause of action having accrued and the Statute of Limitations having commenced to run during the lifetime of the deviser of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue.

Decided cases of a standard character support that proposition, and the court is of the opinion that it is correct. *Jackson v. Moore*, 13 Johns. (N. Y.) 513; *Jackson v. Robins*, 15 id. 169; s. c. 16 id. 537; *Fleming v. Griswold*, 3 Hill (N. Y.) 85; *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.) 319.

When the statute once begins to run, says *Angell*, it will continue to

run without being impeded by any subsequent disability. *Smith v. Hill*, 1 Wils. 134; *Angell, Limitations* (6th ed.), sect. 477; *Currier v. Gale*, 3 Allen (Mass.), 328; *Durouse v. Jones*, 4 T. R. 301; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Welden v. Gratz*, 1 Wheat, 292.

Decisive support to the third conclusion of the Circuit Court is also derived from the authorities cited to sustain the second. Continuous adverse possession of the land, say the court in their third conclusion, having been held by the defendants and their grantors for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, the action is barred, as there was no disability to sue when the cause of action first accrued.

Suppose that is so, then clearly the defendants were entitled to judgment, and there is no error in the record.

SEC. 4. NATURE OF POSSESSION.

ALICE STATE BANK v. HOUSTON PASTURE CO.

247 U. S. 240; 60 L. Ed. 1231; 38 Sup. Ct. 496. (1918)

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a suit to recover 1,280 acres of land in San Patricio County, Texas. There was a trial by jury in which the Court directed a verdict for the plaintiff as to all but certain excepted portions not in controversy here. Exceptions were saved by the defendants, the petitioners, to their not being allowed to go to the jury on the question whether they had a good defense under the Texas statutes of limitation, but they were overruled and the judgment was affirmed by the Circuit Court of Appeals. A petition for *certiorari* was allowed on the suggestion that there was a manifest conflict between the ruling and the decisions of the State Court. * * *

The defendants alleged that if the deeds did not give them a good title, still they had held peaceable and adverse possession of the land, using and enjoying the same, paying taxes thereon, and claiming under deeds duly registered, for more than five years, and therefore that this suit was too late under Rev. Stat. Texas, art. 5674. They contended that the fact appeared as matter of law, and also that at least the jury might find for them and sufficiently saved the question as against the view taken by the Court below,

There was evidence that the land in question was part of a large pasture fenced on the north along the Chiltipin Creek and on the east and west by fences running from the creek to deep water in Nueces Bay. There was evidence also that the defendants or their predecessors had paid the taxes, had pastured their cattle there, and excluded those of others, and that they claimed under duly registered deeds. The ground on which the Court ruled as it did and refused requests of the petitioners was stated by it to be that the water front on Nueces Bay was not "such a barrier as would put in motion the statutes of limitation." This ruling was in deference to *Hyde v. McFaddin*, 140 Fed. 433, 72 C. C. A. 655. But that case was decided on peculiar circumstances, and we do not think an extensive citation from the Texas decisions necessary to show that when the other elements of adverse occupation are present, deep water upon one side of a parallelogram is as good a barrier as a fence. Evidently that is the law in Texas as well as elsewhere, and an enclosure by fences and the Nueces River has been said to sustain the defense of the statute as well as fences all around. *Dunn v. Taylor* (Tex. Civ. App.) 107 S. W. 952, 956; *Id.*, 102 Tex. 80, 87, 113 S. W. 265. The arguments of the respondent on this point at the most do no more than offer considerations of fact that possibly it might be entitled to present to the jury when the case next is tried.

Judgment reversed.

EWING v. BURNET.

11 *Pet. (U. S.)* 41; 9 *L. Ed.* 624. (1837)

MR. JUSTICE BALDWIN delivered the opinion of the court.

In the court below, this was an action of ejectment, brought in November, 1834, by the lessor of the plaintiff, to recover possession of lot No. 209, in the city of Cincinnati; the legal title to which is admitted to have been in John Cleves Symmes, under whom, both parties claimed; the plaintiff, by a deed dated 11th of June, 1798, to Samuel Foreman, who, on the next day, conveyed to Samuel Williams, whose right, after his death, became vested in the plaintiff; the defendant claimed by a deed to himself, dated 21st of May, 1803, and an adverse possession of twenty-one years before the bringing of the suit. It was in evidence that the lot in controversy is situated on the

corner of Third and Vine streets; fronting on the former one hundred and ninety-eight, on the latter ninety-eight feet; the part on Third street is level for a short distance, but descends towards the south along a steep bank, from forty to fifty feet, to its south line; the side of it was washed in gullies, over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil; the lot was not fenced, nor had any building or improvement been erected or made upon it, until within a few years before suit brought; a fence could have been kept up on the level ground on the top of the hill on Third street, but not on its declivity, on account of the deep gullies washed in the bank; and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third street separated this lot from the one on which the defendant resided from 1804, for many years, his mansion fronting on that street; he paid the taxes on this lot from 1810, until 1834, inclusive; and from the date of the deed from Symmes, until the trial, claimed it as his own. During this time, he also claimed the exclusive right of digging and removing sand and gravel from the lot; giving permission to some, refusing it to others; he brought actions of trespass against those who had done it, and at different times made leases to different persons, for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so; on the contrary, several witnesses testified to his continued assertion of right to the lot; their knowledge of his exclusive claim, and their ignorance of any adverse claim for more than twenty-one years before the present suit was brought. They further stated, as their conclusion from these facts, that the defendant had, from 1806, or 7, in the words of one witness, "had possession of the lot;" of another, that since 1804, "he was as perfectly and exclusively in possession, as any person could possibly be of a lot not built on or enclosed;" and of a third, "that since 1811, he had always been in the most rigid possession of the lot in dispute: a similar possession to other possessions on the hill lot." It was further in evidence, that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati, from 1803, till his death in 1824; was informed of defendant having obtained a deed from Symmes, in 1803, soon after it was obtained, and knew of his claim to the lot; but there was no evidence that he ever made an entry upon it, demanded pos-

session, or exercised or assumed any exercise of ownership over it; though he declared to one witness, produced by plaintiff, that the lot was his, and he intended to claim and improve it when he was able. This declaration was repeated often; from 1803, till the time of his death, and on his death-bed; and it appeared that he was, during all this time, very poor; it also appeared in evidence, by the plaintiff's witness, that the defendant was informed that Williams owned the lot before the deed from Symmes, in 1803, and after he had made the purchase.

This is the substance of the evidence given at the trial, and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause; whereupon the plaintiff's counsel moved the court to instruct the jury that on this evidence the plaintiff was entitled to a verdict; also that the evidence offered by the plaintiff and defendant, was not sufficient, in law, to establish an adverse possession by the defendant: which motions the court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions: 1. The refusal of the court to instruct the jury that he was entitled to recover; 2. That the defendant had made out an adverse possession.

Before the court could have granted the first motion, they must have been satisfied that there was nothing in evidence, or any fact which the jury could lawfully infer therefrom, which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the court must assume such fact to have been proved; for it is the exclusive province of the jury to decide what facts are proved by competent evidence. It was also their province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked, must depend upon the opinion of the court, on a finding by the jury in favour of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff.

Now as the jury might have refused credence to the only witness who testified to the notice given to the defendant of Williams' ownership of the lot in 1803, and of his subsequent assertion of claim, and intention to improve it; the testimony of this witness must be thrown out of the case, in testing the correctness of the court in overruling this motion; otherwise we should hold the court below to have erred, in not instructing the jury on a matter exclusively for their considera-

tion; the credibility of a witness, or how far his evidence tended to prove a fact, if they deemed him credible. This view of the case throws the plaintiff back to his deed, as the only evidence of title; on the legal effect of which, the court were bound to instruct the jury as a matter of law, which is the only question to be considered on this exception.

It is clear, that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seisin, and possession thereof, co-extensively with his right; which continued till he was ousted by an actual adverse possession; 6 Pet. 743; or his right of possession had been in some other way barred. It cannot be doubted, that from the evidence adduced, by the defendant, it was competent for the jury to infer these facts; that he had claimed this lot under colour and claim of title, from 1804 till 1834; had exercised acts of ownership on, and over it during this whole period; that his claim was known to Williams and to the plaintiff, was visible; of public notoriety for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams' claim; that it was unknown to the inhabitants of the place, while that of the defendants was known; and that Williams never did claim the lot, or assert a right to it from 1803, till his death in 1824. The jury might also draw the same conclusion from these facts, as the witnesses did; that the defendant was during the whole time in possession of the lot, as strictly, perfectly, and exclusively, as any person could be of a lot not enclosed or built upon; or as the situation of the lot would admit of. The plaintiff must therefore rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find, that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title, or by an adverse possession. On the evidence in the cause the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favour of a possession such as the defendant held from 1804; though it may not have been strictly such an adverse possession, as would have been a legal bar under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years: 6 Pet. 513; and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and

ie jury could so presume, there is no error in overruling the first
ion of the plaintiff.

n the next motion, the only question presented is on the legal suffi-
cy of the evidence to make out an ouster of the legal seisin and
session of Williams by the defendant; and a continued adverse pos-
sion for twenty-one years before suit brought.

n entry by one man on the land of another, is an ouster of the
l possession arising from the title, or not; according to the inten-
with which it is done; if made under claim and colour of right, it
a ouster; otherwise it is a mere trespass, in legal language the inten-
guides the entry, and fixes its character. That the evidence in this
justified the jury in finding an entry by the defendant on this lot,
arly as 1804, cannot be doubted; nor that he claimed the exclusive
t to it under colour of title, from that time till suit brought. There

abundant evidence of the intention with which the first entry was
le, as well as of the subsequent acts related by the witnesses, to
ify a finding that they were in assertion of a right in himself; so
the only inquiry is, as to the nature of the possession kept up. It
well settled that to constitute an adverse possession, there need not
fence, building, or other improvement made: 10 Pet. 442; it suf-
s for this purpose, that visible and notorious acts of ownership are
rised over the premises in controversy, for twenty-one years, after
entry under claim and colour of title. So much depends on the
re and situation of the property, the uses to which it can be ap-
d, or to which the owner or claimant may choose to apply it; that
difficult to lay down any precise rule adapted to all cases. But it
with safety be said, that where acts of ownership have been done
n land, which, from their nature indicate a notorious claim of
perty in it, and are continued for twenty-one years, with the
wledge of an adverse claimant without interruption, or an adverse
y by him, for twenty-one years; such acts are evidence of an ouster
a former owner, and an actual adverse possession against him: if
jury shall think, that the property was not susceptible of a more
ct, or definite possession than had been so taken, and held. Neither
al occupation, cultivation, or residence, are necessary to constitute
al possession; 6 Pet. 513; when the property is so situated as not
admit of any permanent useful improvement; and the continued
m of the party has been evidenced by public acts of ownership,
h as he would exercise over property which he claimed in his own
it, and would not exercise over property which he did not claim.
ether this was the situation of the lot in question, or such was the

nature of the acts done, was the peculiar province of the jury; the evidence in our opinion was legally sufficient to draw the inference that such were the facts of the case; and if found specially, would have entitled the defendant to the judgment of the court in his favour; they, of course, did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession. * * *

WARD v. COCHRAN.

150 U. S. 597; 37 L. Ed. 1195; 14 Sup. Ct. 230. (1893)

* * * At this trial the record discloses that the plaintiff sustained his side of the issue by putting in evidence a chain of title from the United States to himself, consisting of a patent of the United States to Alexander R. McCandlers, dated March 13, 1861, for a tract of land, including the piece in dispute; a deed of Alexander R. McCandlers to Michael Thompson, dated May 2, 1861, for the same tract; a deed of Michael Thompson and wife to Edward B. Taylor, dated July 5, 1862, for said tract; a mortgage of Edward B. Taylor, to Ward, the plaintiff, dated July 28, 1871, on the 20-acre tract in controversy, to secure the payment of certain promissory notes; the record of proceedings in suit by Ward, the plaintiff, against the heirs and legal representatives of Edward B. Taylor, who had died in 1872, to foreclose said mortgage, and a sheriff's deed, under decree in said suit, to Ward, the plaintiff, dated July 11, 1877; a deed of Edward A. Taylor (son and one of the heirs of Edward B. Taylor, and the only heir who had not been made a party to the foreclosure suit) to Ward, the plaintiff, dated June 25, 1885, for the 20-acre tract in dispute. It was admitted that the value of the land was \$20,000 at the time of the bringing of the suit.

The defendant adduced evidence tending to show that one John Flanagan had entered on the tract in dispute in 1868, under a parol sale of said tract to him by Edward B. Taylor; that Flanagan had continued in possession of the tract until 1885, when, on November 25th of that year, Flanagan and wife conveyed the tract to the defendant by deed of that date, who entered into possession.

On December 9, 1889, the jury rendered a special verdict, in the following words and figures:

"We, the jury impaneled and sworn to try the issues joined in the

above-entitled cause, do find and say that one John Flanagan, in the year 1868, entered into the possession of the west one-half of the northeast quarter of the southwest quarter of section 4, in township 15 north, of range 13th east of the 6th principal meridian, in Douglas county, Nebraska, being the land in controversy in this case, under a claim of ownership thereto, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of sixteen (16) years thereafter, and until he sold and transferred the same to the defendant in this case.

"We further find that said John Flanagan and Julia, his wife, by good and lawful deed of conveyance, conveyed said premises to the defendant in this suit in 1885, and surrendered his possession to this defendant, and that said defendant has remained in the open, continuous, notorious, and adverse possession of the same under claim of ownership down to the present time. We therefore find that at the commencement of this suit the defendant was the owner of and entitled to the possession of the said premises, and upon the issues joined in this case we find for said defendant." * * *

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

* * * The action of the court below in rendering judgment on the special verdict in favor of the defendant forms the subject of the first assignment of error. The plaintiff's contention is that the special verdict did not warrant a judgment in favor of the defendant, because it did not find that the possession on which the defendant relied was actual and exclusive.

No state statute has been referred to as regulating or defining title by adverse possession, and, indeed, it is stated in the brief of defendant in error that there is no such statute; but there is a statutory provision that an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of such an action shall have accrued.

Our investigation, therefore, into the sufficiency of the special verdict, must be controlled by the principles established, in this branch of the law, by the decisions of the courts, particularly those of the supreme court of the state of Nebraska, and of this court.

In *French v. Pearce*, 8 Conn. 440, it was said that "it is the fact of exclusive occupancy, using and enjoying the land as his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land."

In *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93, a refusal of the

court to charge that, when the title is claimed by an adverse possession, it should appear that the possession had been "actual, continued, visible, notorious, distinct, and hostile," but merely charging the jury that the possession "must be actual, continued, and visible," was held erroneous. In Pennsylvania it has been repeatedly held that, to give a title under the statute of limitations, the possession must be "actual, visible, exclusive, notorious, and uninterrupted." *Johnston v. Irwin*, 3 Serg. & R. 291; *Mercer v. Watson*, 1 Watts, 338; *Overfield v. Christie*, 7 Serg. & R. 173.

In *Jackson v. Berner*, 48 Ill. 128, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and is not to be made out by inference, but by clear and positive proof; and, further, that the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

In *Foulke v. Bond*, 41 N. J. Law, 527, it was said: "The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted."

It was held in *Cook v. Babcock*, 11 Cush. 208, that, "when a party claims by a disseisin ripened into a good title by the lapse of time as against the legal owner, he must show actual, open, exclusive, and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim."

In *Armstrong v. Morrill*, 14 Wall, 120, this court, speaking through Mr. Justice Clifford, said: "It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as open, notorious, actual, exclusive, and adverse. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee, and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced." *Hogan v. Kurtz*, 94 U. S. 773, is to the same effect.

The authorities in Nebraska are substantially to the same effect on questions of title by adverse possession.

A leading case is *Horbach v. Miller*, 4 Neb. 31, in which it was said that "the elements of all title are possession, the right of possession, and the right of property; hence if the adverse occupant has main-

ad an exclusive adverse possession for the full extent of the statute-limit, the statute then vests him with the right of property, which includes with it the right of possession, and therefore the title becomes complete in him. * * * The submission of the case to the jury exactly was that if they believed from the evidence that the plaintiff erred, for ten years next before the commencement of the action, in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they might find for the plaintiff in error." In *Gatling v. Lane*, 17 Neb. 77, N. W. 227, 453, the language used was: "A person who enters on the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive, adverse possession for ten years, thereby disseises the owner." In *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424, a recovery was sustained where the testimony clearly showed that "the defendant and the person under whom he claims have been in the open, notorious, and exclusive possession for ten years next before the suit was brought." In *Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295, the following instructions, which had been given in the trial court, were approved by the supreme court: "The jury are instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile occupancy of the land and claim of title, with the intention to hold it as against the true owner and all other parties. Such occupancy, if continuous for ten years, ripens into a perfect title, after which it is immaterial whether the possession can be continued or not." "If you find, and believe from a preponderance of the testimony in this case, that the plaintiff was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for ten years, claiming to own and hold them as against all other persons, as to such lots he is entitled to recover."

Tested by these definitions, it is obvious that if the title relied on in this case by the defendant below was fully described and characterized by the special verdict, it was defective in two very essential particulars in that it was not found to have been actual and exclusive. Adverse possession not actual, but constructive; not exclusive, but in participation with the owner or others,—falls very far short of that kind of adverse possession which deprives the true owner of his title.

Where a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous.

GAFFORD v. STRAUSS.

89 Ala. 282; 18 Am. St. Rep. 111; 7 So. 248; 7 L. R. A. 568. (1889)

* * * CLOPTON, J. Both parties concede that J. M. Gafford was formerly seised and possessed of the land in controversy. Appellee, who was the plaintiff in the circuit court, derives title under a mortgage executed by him February 22, 1873. Defendants do not claim that title ever passed from Gafford to them, or either of them, by any legal conveyance. Their defense is, that Gafford, being indebted to Mrs. Sallie Gafford, who was his wife, for money of her separate estate which he received and used, gave her, in February, 1872, by parol, the lands on which he then lived, including the lands in controversy, in payment thereof, putting her in possession, and that she has been in continuous possession, claiming the land as her own, for the length of time prescribed by the statute of limitations as a bar to the entry of plaintiff. The court having given the affirmative charge in favor of plaintiff, the main inquiry arises, whether, from the undisputed facts, the conclusion of law is, that Mrs. Gafford did not, and could not, have such adverse possession as, by its own mere force, could ripen into a title.

The legal title in the lands, being vested in Gafford when the mortgage was executed, thereby passed to plaintiff. There is no pretense that he had notice of Mrs. Gafford's claim. The possession of the mortgagor thereafter was referable and in subordination to the mortgagee's title, unless rendered adverse by an open and positive disclaimer of his title brought to his knowledge: *Coyle v. Wilkins*, 57 Ala. 108. So long as the mortgagor holds in subserviency to the title of the mortgagee, the possession of his vendee, under a parol contract of sale, cannot become adverse to the mortgagee, unless there is a disclaimer of the title of the mortgagor, and a holding adversely to him. Counsel invoke the principle pronounced in *Collins v. Johnson*, 57 Ala. 304, and *Vandiveer v. Stickney*, 75 Ala. 227, that an uninterrupted possession of a donee, under a parol gift, or by a vendee under a parol agreement to purchase, when the purchase-money is paid, accompanied by a claim to the lands, is adverse to the donor or vendor, and will be protected by the statute of limitations, maturing into a perfect title, if continuous for the period prescribed by the statute. But to have such effect, the facts essential to constitute an adverse holding must enter into and characterize the possession. The mere

assertion of a hostile claim or right, and of possession unaccompanied by adverse actual occupancy, is insufficient.

There is no dispute that Gafford entered into possession of the lands in 1862, and continued in possession, claiming them as his own, until February, 1872, the time of the alleged parol contract of sale. While Mrs. Gafford testified that she was put into possession at that time, and thereafter claimed the possession and ownership, she also states that there was no change of possession, but she and her husband continued to reside on and occupy the lands, and he controlled them until his death, which occurred in 1882. Ten years not having elapsed after his death before the institution of the action, the bar of the statute can become complete only by tacking her possession, during the continuance of the marital relation, to her possession after the death of her husband. The direct question, then, is, whether the wife can hold premises adversely to her husband, which she claims to have derived from him under a parol agreement of purchase, and on which they continued to reside and jointly occupy as husband and wife. The statement and application of a few elementary principles furnish an answer.

Possession, to be adverse, so as to vest title in the possessor after the lapse of the requisite time, must be not only open, notorious, and continuous, but also exclusive. It must operate to oust or dispossess any other person who may claim title or right of possession. In order to fall within the operation of the statute of limitations, the possession must be sufficiently exclusive to put the dispossessed claimant to his action or entry. This can never be the case where the party having the title is in possession, though it may be joint. Two contemporaneous possessions of the same property, each adverse to the other, is a legal absurdity not conceivable. Hence when two persons are in possession, claiming under different and hostile rights, the law refers the possession to the party having the title: *Pickett v. Pope*, 74 Ala. 122; *Bragg v. Massie*, 38 Ala. 89; 79 Am. Dec. 82; *Farmer v. Eslava*, 11 Ala. 1028.

It may be that, under the laws in force at the time of the transaction in question, a title would vest in a married woman by the mere force of an uninterrupted possession of real estate for the statutory period under a parol gift or purchase, where the husband never had nor claimed any title, nor interfered with her possession. There is a clear distinction between a possession of that nature, and a possession under a gift or purchase directly from the husband. There being no actual change of possession, the oral agreement between Gafford and his wife

was void; it vested no right nor equity, and created no separate estate. It is material only to the extent it may constitute the origin and basis of an adverse possession. Had Gafford executed a conveyance directly to his wife, it would have been inoperative as a transfer of the legal title. Their continuance in joint possession thereafter, for no length of time, could have availed to divest him of the title, and vest it in her. Certainly, a continuance of joint occupancy, without a conveyance, merely under a parol gift, or agreement of purchase, can have no greater effect. The elements essential to an adverse possession, in that sense which can ripen into a title by its own force and the lapse of time, do not, and cannot, exist in such case. The husband is not ousted or disseised, actually or constructively; the possession of the wife does not exclude or encroach upon his possession. The possession of Mrs. Gafford during coverture was the possession of her husband, and did not become antagonistic to his rights: *Bell v. Bell*, 37 Ala. 536; 79 Am. Dec. 73; *Hendricks v. Rasson*, 53 Mich. 575; 1 Am. & Eng. Ency. of Law, 250. It results that the statute of limitations did not commence to run until the death of her husband.

Affirmed.

This case is the subject of a monographic note in 18 Am. St. Rep. 113 on Title by Adverse Possession as between Husband and Wife.

PAGE v. BRANCH.

97 N. C. 97; 2 Am. St. Rep. 281; 1 S. E. 625. (1887)

Plaintiffs claimed to be tenants in common with defendants of the land in dispute, while defendants claimed to be sole seised. The jury found plaintiffs entitled to four-fifths of one-sixth of the property, and that defendants were not sole seised. Plaintiffs introduced a deed from one McClure and wife, dated March 19, 1847. The evidence showed that Dennis Branch entered under this deed, and died in 1847, leaving his widow in possession until 1866, when she conveyed to A. B. Branch, son of Dennis, and he conveyed to defendants, who were also sons of Dennis Branch. It was also shown that Dennis Branch's widow paid a debt against the land, and claimed it adversely until she conveyed it, and that no dower was assigned to her. It was also shown that A. B. Branch and defendants, his vendees, claimed the land adversely from 1866 until July, 1883. The plaintiffs produced

to show that they had succeeded to the interest of heirs of Denranch to the extent of the interest claimed by them. (The other appear from the opinion.

vis, J. The only question for our consideration is: Did the err in refusing to instruct the jury that seven years' adverse ssion under the deed of 1866 would be sufficient to bar the plain-title, even if Rebecca Branch had not claimed adversely to the at law or their grantees?

e charge of his honor and the finding of the jury render it unsary for us to consider the character of Rebecca Branch's posn,—it was not adverse: *Grandy v. Bailey*, 13 Ired. 221.

1866, the plaintiffs and defendants were tenants in common, and continued so to be, unless the possession of the defendants under eed of Rebecca Branch bairred the plaintiffs. "The possession of enant in common is, in law, the possession of all his co-tenants, ise they claim by one common right. When, however, that posn has been continued for a great number of years, without any from another who has a right and is under no disability to assert will be considered as evidence of title to such sole possession; and e it has so continued for twenty years, the law raises a presump-that it is rightful and will protect it. * * * At any time, then, ig the twenty years, the tenant out of possession had a right, and t have enforced it by an action": *Black v. Lindsay*, Busb. 468.

ie tenant in common cannot make his possession adverse to his nant. He is presumed to hold by his rightful title, and it will, twenty years' adverse possession to bar the co-tenant, and a deed co-tenant to a stranger, though it purport to convey the entire e, has no other effect than to invest the vendee with the rights of vendor, and does not change the relation of co-tenant, which had isted between the vendor and the co-tenant. This rule extends to urchaser of the interest of a tenant in common at execution sale, to the vendee of such purchaser, as was decided in *Ward v. ner*, 92 N. C. 93. In that case, the interest of W. W. Ward, one re co-tenants, had been purchased at execution sale by one Day, Day, by deed professing to convey the whole of the land, sold to defendants, Farmer and Southerland, who entered into possession he 1st of January, 1873, and occupied and used the same to Nober, 1883, claiming it as their own, under their deed from Day, ne else being in possession, clearing and otherwise, improving it, pying it by marked and visible lines publicly, and paying the taxes. he court below instructed the jury that no possession short of

twenty years, except after an actual ouster, would be adverse as against tenants in common, and this was sustained. Ashe, J., in the opinion in *Ward v. Farmer*, 92 N. C. 93, in referring to *Day v. Howard*, 73 Id. 4, in which the same principle is held, calls attention to the fact that Chief Justice Pearson, who delivered the opinion in *Day v. Howard*, *supra*, fixed the time at ten years, instead of twenty, and says: "It will be observed that this was a mere *obiter dictum*, and the learned chief justice only says he is inclined to the opinion, and expresses none, because that state of facts is not presented." And Bynum, J., in *Covington v. Stewart*, 77 Id. 151, says: "It has never been held in North Carolina that a less period than twenty years' adverse possession by one tenant in common will raise the presumption of ouster and sole seisin; and this, whether the possession was held by the tenant in common himself, or by him a part of the time, and until his death, and then continued by his heirs for the residue of the twenty years"; and referring to *Day v. Howard*, *supra*, adds that his honor who tried the case of *Covington v. Stewart*, *supra*, in the superior court, "was probably thrown from his guard by a suggestion made by the chief justice in delivering the opinion, in the latter case, that where a tenant in common conveys to a third person, an adverse possession of ten years by the purchaser would probably give him a good title, by the presumption of an actual ouster. The point did not rise in that case * * * but the possession of twenty years, which raises a presumption of title, as the law has been heretofore administered, has now the force and effect of an actual title"; and refers to the statute.

Assuming that the period of ten years, in the case of *Day v. Howard*, 73 N. C. 4, was inadvertently fixed, as is indicated by Justice Bynum and Justice Ashe, it may be stated as well settled in this state that no possession for a period less than twenty years will amount to an ouster of one co-tenant by another co-tenant, or by anyone deriving title under another co-tenant. There must be something more than mere possession for a less period than twenty years to constitute an ouster. In *Thomas v. Garvan*, 4 Dev. 223, 25 Am. Dec. 708, Gaston, J., says: "When the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting a legal presumption of such facts as will sanction the possession and protect the possessor"; and this has been followed uniformly, unless *Day v. Howard*, *supra*, constitutes an exception: *Cloud v. Webb*, 4 Dev. 290; 25 Am. Dec. 711; *Meredith v. Andres*, 7 Ired. 5; 45 Am. Dec. 504; *Black v. Lindsay*, Busb. 467; *Halford v. Tetherow*,

2 Jones, 393; Linker v. Benson, 67 N. C. 150; Covington v. Stewart, 77 Id. 151; Caldwell v. Neely, 81 Id. 114.

The length of time necessary to raise the presumption of ouster was not the point in Day v. Howard, *supra*, and the principle enunciated, and the reasoning of the chief justice in that case, are in harmony with these decisions. * * *

LEVY v. YERGA.

25 Neb. 764; 13 Am. St. Rep. 525; 41 N. W. 773. (1889)

REESE, C. J. This is an action in ejectment for the possession of a narrow strip of land within the inclosure of defendant, and which it is alleged is the property of plaintiff in error, the adjoining land-owner.

The answer of defendant in error denied the plaintiff's ownership, averred ownership in defendant, and alleged that he had "been in the lawful, open, notorious, peaceable, exclusive, and continuous possession of said premises for the period of more than ten years prior to the commencement" of the suit.

A trial was had to the court without the intervention of a jury, which resulted in a general finding and judgment in favor of the defendant in the action.

It is conceded by plaintiff that defendant has been in possession of the property for more than ten years prior to the commencement of the action, and that if such possession was notorious, and hostile to plaintiff and his grantors, that the statute has run. But it is insisted that such is not the possession of defendant, but that his inclosure was only intended to reach to the true line, and that his possession has been only with reference thereto; that his occupation of the land belonging to plaintiff and his grantors has been solely by mistake, and that defendant's claim of ownership extended only to the land described in the deed, the property being described by metes and bounds.

We have carefully examined the evidence submitted to the trial court, and find that sufficient evidence was submitted to justify a finding that defendant's occupation has been with reference to fixed boundaries, existing at the time of his purchase, and which it was supposed was within the actual purchase made by him, and without reference to the particular land described in the deed. There is proof that, about the time of the purchase, the land was surveyed, and that,

by such survey, it was found that a ditch, which had been previously excavated by an occupant, was upon the line. And that, in the construction of defendant's fence, he built with reference to said ditch as the line, placing this fence immediately inside of it. And that the whole of his possession had been with reference to said ditch as his boundary line, and as a monument thereof. This ditch was constructed, perhaps, prior to the year 1856, and, as stated by one of the witnesses, was originally intended as a "ditch fence," upon that boundary line. While it appears the property has not been occupied during all this time, yet it is shown that, during the time it was occupied, it was with reference to the ditch referred to as the boundary line; that the occupancy has been continuous, and with reference to it, for more than ten years prior to the commencement of the action.

Under the rule stated in *Tex v. Pflug*, 24 Neb. 666, 8 Am. St. Rep. 231, and which we believe to be correct, the statute of limitation had run in favor of defendant at the time of the commencement of the action.

It is shown that, during the occupation of defendant, he leased from plaintiff's grantor the tract of land adjoining upon the west, which, it is alleged, included the strip referred to, and that for a number of years he had it inclosed for the purpose of a pasture, and that thereby he recognized the ownership of plaintiff, and that the running statute was broken, his possession during that time not being adverse.

It is clearly shown by the evidence that, at the time of the lease referred to, and during the whole thereof, the land in question was inclosed by defendant as his own property; while it is true that he rented what was known as the Thompson tract, yet it is very evident that in the contract of lease, which was oral, and in which contract the particular strip referred to was not treated as a portion of the Thompson tract, nor was defendant's possession thereof in any manner changed from what it had been prior thereto.

The rule stated in *Tex v. Pflug*, *supra*, on this part of the case must control, and the decision of the district court, that the tenancy was not inconsistent with defendant's possession as owner, was correct.

McMILLAN v. FULLER.

41 App. D. C. 384. (1914)

MR. CHIEF JUSTICE SHEPARD delivered the opinion of the court:

* * * Defendant selected his lot, had it surveyed, presumably by the District Surveyor, who under the building regulations, is authorized to locate the lines for those intending to build, enclosed it, and erected a substantial house within those lines. For more than fifteen years he occupied the house in complete ignorance that the deed, received by his attorney, actually conveyed the adjoining lot. The mistake seems to have been in the preparation of his deed, and not in the occupation of the lot. We are of the opinion that the possession was adverse within the meaning of the statute. *Johnson v. Thomas*, 23 App. D. C., 141, 150. In that case it was said: "Certainly it is well established law that if a man goes upon the land of another, whether he does so by honest mistake upon the supposition that it is his own, or with the deliberate purpose of appropriating to himself that which is the property of another, and occupies it exclusively and adversely to all the world for a period of twenty (now fifteen) years or upwards, he may by such adverse occupation acquire a complete title in himself. This is elementary doctrine in the law of adverse possession; and most assuredly greater consideration is due to a title by adverse possession based upon an honest mistake than to one based upon deliberate and wilful wrong." See also *Rudolph v. Peters*, 35 App. D. C., 438, 447. * * *

PROPRIETORS OF KENNEBEC PURCHASE v. SPRINGER.

4 Mass. 416; 3 Am. Dec. 227. (1808)

PARSON, C. J. The demandants sued the tenant in a writ of entry counting on their own seisin within thirty years, and demanding the northerly half of lot numbered thirty-two in the second range of lots of which they had been disseised by the tenant. On the trial, upon the general issue, the jury found a verdict for the demandants; and the tenant moves for a new trial, because, as he supposes, the verdict was against the evidence, which is reported by the judge.

The tenant's title was under a release from James Springer, who

as the tenant alleges, entered more than thirty years before, and disseised the demandants; for no evidence was given that James entered claiming any title or right to the land.

The statute of 1786, c. 13, limits the time of suing any real action by any corporation, declaring on its own seisin, to thirty years next after such seisin. And the tenant insists that by virtue of this statute, the demandants are barred by the disseisin done to them by his releasor in 1775, which is more than thirty years before the *teste* of their writ.

The law upon this subject seems to be very well settled. When a man is once seised of land, his seisin is presumed to continue, until a disseisin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel, to which he has a right; for, in this case, an entry on part is an entry on the whole. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seisin, but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further than his actual exclusive occupation; for no further can the party seised be considered as ousted; for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

Let us now consider the evidence, as applicable to these principles. The demandants proved a title to the tenements demanded and a seisin in 1769. This seisin must be presumed to be continued until they were disseised, as they continued to claim title to the land. James Springer entered on the front lot, numbered thirty-two, in 1775. He continued in the occupation of that lot, improving and fencing a part, and living on it until he died; having in the year he entered, caused it to be run round by a surveyor, and trees marked on the lines. This land is not demanded. But the northerly half of lot numbered thirty-two on the second range is demanded. And it appears that when he surveyed the front lot in 1775, he at the same time caused the demanded premises to be run round by the surveyor, and the lines marked. There is no evidence that he ever fenced any part of the land demanded until 1792, which is within thirty years, or exercised any act of ownership on it, except that he sometimes cut the grass on a small meadow which was part of it. Having fenced a part in 1792, he con-

vayed the premises to the tenant, who entered and has occupied the same under his deed ever since.

On considering the evidence, we are satisfied that the demandants were not disseised until 1792, by the entry of the tenant; that the running round the land by a surveyor, and marking the lines by the direction of one who claims no title to the land, is not such an exclusive occupation of the land as can amount to an ouster or disseisin of the demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the land, amount to a disseisin.

To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title, otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted.

As the tenant set up no title prior to 1792, but relied entirely on the statute as a bar, and as it appears to us, from the facts reported, that the demandants were seised within thirty years next before the *teste* of their writ, we are of opinion that the conclusion made by the jury from the evidence in the cause was legal, and that their verdict must stand.

Judgment according to verdict.

LESSEE OF CLARKE et al. v. COURTNEY et al.

5 *Pet. (U. S.)* 319; 8 *L. Ed.* 140. (1831)

MR. JUSTICE STORY delivered the opinion of the Court.

* * * In considering the points growing out of this exception, it may be proper to advert to the doctrine which has been already established in respect to the nature and extent of the rights, growing out of adverse possession. Whether an entry upon land, to which the party has no title and claims no title, be a mere naked trespass, or be an ouster or disseisin of the true owner, previously in possession of the land, is a matter of fact depending upon the nature of the acts done, and the intent of the party so entering. The law will not presume an ouster without some proof; and though a mere trespasser

cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseised, yet the latter is not bound to consider a mere act of trespass to be a disseisin. If a mere trespasser, without any claim or pretence of title enters into land, and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter. But in such case the possession of the trespasser is bounded by his actual occupancy; and consequently the true owner is not disseised except as to the portion so occupied. But where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective, or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For, if the true owner be at the same time in possession of a part of the land, claiming title to the whole, then his seisin extends by construction of law to all the land which is not in the actual possession and occupancy, by enclosure or otherwise, of the party so claiming under a defective deed or title.

The reason is plain; both parties cannot be seised at the same time of the same land under different titles, and the law therefore adjudges the seisin of all, which is not in the actual occupancy of the adverse party, to him who has the better title. This doctrine has been on several occasions recognized in this Court. In *Green v. Lister*, 8 Cranch, 229, 230, S. C. 3 Peter's Cond. Rep. 97, 107, the Court said; the general rule is, that if a man enters into lands, having title, his seisin is not bounded by his occupancy, but is held to be co-extensive with his title. But if a man enters without title, his seisin is confined to his possession by metes and bounds. Therefore, the Court said, that as between two patentees in possession claiming the same land under adverse titles, he who had the better legal title was to be deemed in seisin of all the land not included in the actual close of the other patentee. The same doctrine was held in *Barr v. Gratz*, 4 Wheat, Rep. 213, 223; where the Court said, that where two persons are in possession at the same time under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seised, and therefore the seisin follows the title. And that where there was an entry without title, the disseisin is limited to the actual occupancy of the party disseising; and in reference to the facts of that case, the Court held that in a conflict of title and possession, the constructive actual seisin of all the land not in the actual

adverse possession and occupancy of the other, was in the party having the better title.

In *The Society for Propagating the Gospel v. The Town of Pawlet*, 4 Peter's Rep. 480, 504, 506, which came before the Court upon a division of opinion upon a state of facts agreed; the Court held, that where a party entered as a mere trespasser without title, no ouster could be presumed in favour of such a naked possession; but that where a party entered under a title adverse to the plaintiffs, it was an ouster of, or adverse possession to the true owner.

It appears to us also that the doctrines, thus recognized by this Court, are in harmony with those established by the authority of other Courts; and especially of the Courts of Kentucky, in the cases cited at the bar. Johnson's Digest, Ejectment, V, b. Big's Dig. Seisin and Disseisin in A, B, C, D. * * *

CHAPTER XXVII.

PRESCRIPTION.

KILBURN v. ADAMS.

7 Met. 33; 39 Am. Dec. 754. (1843)

Trespass on the case for stopping up a way claimed by the plaintiffs over land of the Groton Academy. The defense was, that the defendant closed the way by direction of the trustees of the academy. The plaintiffs claimed the right of way as appurtenant to a tract of land owned by them, adjoining the academy grounds. The plaintiffs derived title to their land through *mesne* conveyances from one James Brazer, who owned the same in May, 1805, and until his death in 1818. His son, William F. Brazer, then became owner, under the will of his father and occupied the land until 1822, when he conveyed to one Ammidon. There was evidence that prior to James Brazer's ownership, there was a house on his lot, built by a former owner, and that the said owner was accustomed to pass over the academy grounds to a highway. The house that formerly stood on the plaintiff's lot was burnt in 1801, and James Brazer built another house there in 1805, and both he and his successors continued to use the alleged way over the academy lot. There was, however, another passage-way to the highway, down a steep hill, which was more frequently used, except by heavily loaded teams. The academy lot was uninclosed, and remained so until it was fenced in 1841, which was the trespass complained of. It appeared that along the alleged way the grass was worn away by travel, and that the way was used not only by Brazer and his successors, but also by the occupants of the academy building for the purpose of carting wood, and that the academy boys used the whole academy lot as a play-ground, and all persons passed freely over it in any direction. There was evidence that while Brazer was owner, he, on one occasion, carted gravel upon the path and repaired it at a point where it had been gullied by the rain. When Ammidon was owner he filled up a gully in the path and carted dirt along the path, so as to make better passing over it. On a subsequent occasion a surveyor

of the highway dug a ditch along the side of the highway, which cut off the path, but upon the remonstrance of the party who then owned the plaintiffs' lot, he filled up the ditch. It was proved by the defendant that James Brazer, during all the time he owned the lot, until his death, in 1818, was one of the trustees of the academy, and that his son William F. was elected a trustee in 1820, and continued so to be until after his conveyance to Ammidon. A nonsuit was entered; the court below being of opinion that as Brazer was one of the trustees, his use of the way was to be deemed merely permissive, and that the possession of William F. Brazer, prior to being chosen trustee, could not be tacked to that of Ammidon and his successors to make out a right of way by adverse possession. The propriety of this opinion was submitted for the consideration of the whole court.

SHAW, C. J. The question is, whether the plaintiffs, owners of an estate adjoining the academy lot, acquired a right of way over that lot, by the adverse and uninterrupted use of such way, by themselves and the former owners and occupiers of the estate, under the circumstances set forth in the report. The rule, we think, is, that where a tract of land, attached to a public building, such as a meeting-house, town-house, school-house, and the like, and occupied with such house, is designedly left open and uninclosed, for convenience or ornament, the passage of persons over it, in common with those for whose use it is appropriated, is, in general, to be regarded as permissive, and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietors think fit to make of it; and therefore, until they think proper to inclose it, such use is not adverse, and will not preclude them from inclosing it when other views of the interests of the proprietors render it proper to do so. And though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply, unless there be some decisive act, indicating a separate and exclusive use, under a claim of right. A regularly formed and wrought way across the ground, paved, macadamized, or graveled and fitted for use as a way, from his own estate to the highway, indicating a use distinct from any use to be made of it by the proprietors, would, in our opinion, be evidence of such exclusive use and claim of right. So would be any plain, unequivocal act, indicating a peculiar and exclusive claim, open and ostensible, and distinguishable from that of others. But the fact that a particular track or line was a little more worn and marked by travel than the general surface of the lot, or that the adjacent proprietor had occasionally leveled a spot gullied by the rain, could scarce-

ly be regarded, independently of other proof as indicative of a claim of right: *First Parish in Gloucester v. Beach*, 2 Pick, 60, note.

In the present case, the court are of opinion that there is no evidence of the use of this way, by any of the plaintiff's predecessors, until James Brazer built a house there in 1805; nor after that time, of any use so exclusive, peculiar, or different from that of all others having occasion to pass and repass, as to found a claim of right for a way over this open lot, attached to and occupied with the academy. The fact that James Brazer and his son were, for a greater part of the time, trustees of Groton Academy, and members of the corporation in which the estate was vested, is to be taken into consideration, we think, in weighing the evidence. For although the relation was not such as to preclude them from taking an easement by actual grant, or from acquiring one by such unequivocal acts of adverse and uninterrupted possession as to prove a grant; yet doubtful or equivocal acts will not be so readily deemed adverse, as those of a stranger having no rights in the estate, and charged with no duty, growing out of his fiduciary relation, to protect and preserve it. Many of the same acts which, in a stranger, having no right, and charged with no duty, ought to be deemed adverse, and attributed to a claim of right, would, in the case of a trustee and corporator, be regarded as permissive, and done under an implied license from himself and his associates.

If the acts of Ammidon and others, who came in under William F. Brazer, in 1822, can be considered as indicating, more unequivocally, a claim of right, they would not avail the plaintiffs, because they do not prove an uninterrupted claim for twenty years; the trustees of the academy having passed a vote in 1841, directing the land to be inclosed, and the way cut off. The court are therefore of opinion that the nonsuit must stand.

PARKS v. BISHOP.

120 Mass. 340; 21 Am. Rep. 520. (1876)

Bill in equity alleging that the plaintiff was the owner of the fee in the soil and of a right of way in a passage-way leading from Purchase street by land of the plaintiff and to a shop of the defendant which adjoined the rear of a store of the defendant on Atlantic avenue; and praying that the defendant might be restrained from using

the way as appurtenant to the land on which that store was built, or for the purpose of passing, or of carrying merchandise or other things, between that store and Purchase street. The answer alleged that the defendant had acquired a right to such use by adverse possession.

Hearing before Wells, J., who ordered an injunction to issue, and reserved the case for the consideration of the full court, upon a report, the material part of which is stated in the opinion.

GRAY, C. J. The report of the judge before whom this case was heard in the first instance, states the facts proved at the hearing, and his decision that the use of the way in question by the defendant, in the manner and for the purpose complained of, was not justified by any right acquired by Lakin (under whom the defendant claims) through the use of the way by him as stated in the report, and that an injunction should issue, subject to the revision and determination of the full court upon the question, among others, "whether Lakin, upon the facts stated, had acquired such a right of way as to constitute a good defense." The report, being on the equity side of the court, submits to our revision all inferences of fact, as well as conclusions of law. *Wright v. Wright*, 13 Allen, 207, 209; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 47.

When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. *Ballard v. Dyson*, 1 Taunt. 279; *Dowling v. Higginson*, 4 Mees. & W. 245; *Dare v. Heathcote*, 25 L. J. (N. S.) Exch. 245; *Williams v. James*, L. R., 2 C. P. 577; *Sloan v. Holliday*, 30 L. T. (N. S.) 757. But if the condition and character of the dominant estate are substantially altered—as in the case of a way to carry off wood from wild land, which is afterward cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterward turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. *Atwater v. Bodfish*, 11 Gray, 150; *Wiles J.*, in L. R., 2 C. P. 582; *Wimbledon Commons v. Dixon*, 1 Ch. D. 362.

In the present case the report states that for more than twenty years Lakin had, in the shop abutting upon the passage-way in question, a

steam engine, which was driven by boilers in the larger building on the lot behind, and was used for operating the machinery in that building, the three stories of which were respectively occupied for a blacksmith's shop, a carriage shop, and a paint shop; that there was a door in the wall between the two buildings, which was constantly used for the purpose of passing between them through the engine room and over the passage-way; that the space in the passage-way was occasionally used for the purpose of setting tires upon wheels, in connection with the work in the shop; that all the coal for use under the boilers was brought in through the passage-way, and deposited in the basement or cellar under the engine room, until used in the regular course of business; and that the way was used generally as a back entrance or thoroughfare, as convenience required, in connection with the shops occupied by Lakin, without question or objection, for more than twenty years.

These facts appear to the court to justify and require the conclusion that Lakin had acquired by prescription a right of way for all purposes reasonably necessary for a manufactory upon the two lots, and which, upon the buildings being destroyed by fire and rebuilt for a manufactory and store-house, he was entitled to use for the purpose of bringing goods into the smaller building abutting upon the passage-way, to be thence hoisted up into the larger building, for storage and use therein; that there has been no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement, and that for this reason the defendant has not exceeded his rights in the use of the passage-way.

Bill dismissed.

CHAPTER XXVIII.

ACCRETION.

STATE OF NEBRASKA v. STATE OF IOWA.

143 U. S. 359; 36 L. Ed. 186; 12 Sup. Ct. 396. (1892)

This is an original suit, brought in this court by the state of Nebraska against the state of Iowa, the object of which is to have the boundary line between the two states determined. Iowa was admitted into the Union in 1846, and its western boundary, as defined by the act of admission, was the middle of the main channel of the Missouri river. Nebraska was admitted in 1867, and its eastern boundary was likewise the middle of the channel of the Missouri river. Between 1851 and 1877, in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective states claiming jurisdiction over the same tract of land. To the bill filed by the state of Nebraska the state of Iowa answered, alleging that this disputed ground was part of its territory; and also filed a cross-bill praying affirmative relief, establishing its jurisdiction thereof, to which cross-bill the state of Nebraska answered. Replications were duly filed and proofs taken.

BREWER, J. It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as "accretion," the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. U. S.* 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he

cannot be held accountable for his gain." See also, *Jones v. Soulard*, 24 How. 41; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepherd*, 4 Wall. 502; *St. Clair v. Lovington*, 23 Wall. 46; *Jeffries v. Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518.

It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, "avulsion." In *Gould, Waters*, 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl. Comm. 262; *Aug. Water-Courses*, 60; *Trustees v. Dickinson*, 9 Cush. 544; *Buttenuth v. Bridge Co.*, 123 Ill. 535, 17 N. E. Rep. 439; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Murry v. Sermon*, 1 Hawks, 56.

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel. * * *

The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri river, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jeffries v. Land Co.*, 134 U. S. 178, 189, 10 Sup. Ct. Rep. 518. * * *

The case before us is presented on testimony, and not on allegation. But what are the facts apparent from that testimony? The Missouri river is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Company across the Missouri river in the vicinity of the tracts in controversy, the builders went down to the solid rock, 65 feet below the surface, and there found a pine log a foot and a half in diameter,—of

course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said, that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony: that, while there may be, an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color, which, in the history of the country, has made it known as the "muddy" Missouri; and also that, while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual, and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity

of the change, caused by the velocity of the current, and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and onto the other, the law of accretion controls on the Missouri river as elsewhere; and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between states. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained, as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

We think we have, by these observations, indicated as clearly as is possible the boundary between the two states, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

PHILADELPHIA CO. v. STIMSON.

223 U. S. 605; 56 L. Ed. 750; 32 Sup. Ct. 340. (1912)

MR. JUSTICE HUGHES delivered the opinion of the court:

* * * It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the

former line. *Rex v. Yarborough*, 3 Barn. & C. 91; S. C. 2 Bligh, N. R. 147, 4 Dowl. & R. 790, 27 Revised Rep. 292, 1 Dow. & C. 178, 1 Eng. Rul. Cas. 458, sub. nom. *Gifford v. Yarborough*, 5 Bing. 163; *New Orleans v. United States*, 10 Pet. 662, 717, 9 L. Ed. 573, 594; *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818; *St. Clair County v. Lovington*, 23 Wall. 46, 67, 68, 23 L. ed. 59, 63, 64; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 190-193, 33 L. ed. 872, 876-878, 10 Sup. Ct. Rep. 518; *St. Louis v. Rutz*, 138 U. S. 226, 245, 34 L. ed. 941, 949, 11 Sup. Ct. Rep. 337; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Shively v. Bowlby*, 152 U. S. 1, 35, 38 L. ed. 331, 344, 14 Sup. Ct. Rep. 548; *Hale, De Jure Maris*, chaps. 1, 4, 6; *Hargrave's Law Tracts*; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581. The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits. It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *St. Clair County v. Lovington*, 23 Wall. 46, 67, 68, 23 L. ed. 59, 63, 64.

We are confined to the allegations of the bill. We have not the advantage of proof and findings, or even of a particularized description in the bill itself, as to the precise character of the alterations in the banks of Brunot's island which took place during the long period to which the bill refers. It is alleged "that subsequent to the establishment in 1865 by said commissioners of the line of high-water mark, as aforesaid, a considerable amount of the soil of the shore of said Brunot's island on the so-called back channel, within the said high-water mark, was washed away from time to time by heavy floods and freshets, so that a large part of the upland of the island, that is, the land above high-water mark, became and was overflowed and slightly submerged by water, but said land was not submerged to an extent sufficient to permit of navigation of any kind thereover." There is no other statement on the point save that the bill asserts that the complainant was entitled to reclaim, "keeping at all times within the lines of the part that had been torn away by the violence of the waters."

It is manifest that these allegations are inadequate to support the complainant's contention. The determining words are that the land was "washed away from time to time by heavy floods and freshets," and the reference is to what occurred in many years. This is far from a statement that at any particular time there was such a sudden, violent, and visible change as to justify a departure from the ordinary rule which governs accretion and diminution, albeit the stream suffer wide fluctuations in volume, the current be swift, and the banks afford slight resistance to encroachment. * * *

CHAPTER XXIX.

ESTOPPEL.

VAN RENSSELAER v. KEARNEY et al.

11 *Howard U. S.* 297; 13 *L. Ed.* 703. (1850)

MR. JUSTICE NELSON delivered the opinion of the court.

* * * John Van Rensselaer, being seized in fee of a large tract of land in the county of Columbia, State of New York, made and published his last will and testament on the 25th of May, 1782, by which he devised the same to John J. Van Rensselaer, 'his grandson, for and during his natural life; and from and after his decease, to the first son of the body of the said John J. lawfully begotten, and to the heirs male of his body; and, in default of such issue, then to the second, third, and every other son of the said John J., successively, and, in remainder, the one after the other, as they shall be in seniority of birth, and the several and respective heirs male of the first, second, third, and other son or sons; the eldest of such sons, and the heirs male of his body, being always preferred.

The testator died in 1783, leaving John J., the grandson, surviving, who entered into the possession and enjoyment of the estate. John J. had five children, John, the first-born, whose birth was in 1791, Jeremiah, the present complainant, Cornelius, and Glen, and a daughter, Catherine G.

By an act of the legislature of the State of New York, passed 23d of February, 1786, it was enacted as follows: "That all estates tail shall be, and hereby are, abolished; and that, in all cases where any person or persons now is, or, if the act hereinafter mentioned and repealed (referring to an act passed 12th July, 1782) had not been passed, would now be, seized in fee tail of any lands, tenements, or hereditaments, such person and persons shall be deemed to be seized of the same in fee simple absolute; and further, that, in all cases where any person or persons would, if the said act and this present act had not been passed, at any time hereafter become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise,

gift, grant, or other conveyance heretofore made, or hereafter to be made, or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to become seized thereof in fee simple absolute." 3 Rev. Stat. N. Y., 1st ed., App. 48; 1 Rev. Laws, 1813, p. 52.

As we have already stated, John, the first-born son of John J., the grandson, was born in 1791, and he died without issue in 1813, while the life estate was running, his father having survived until 1828.

On the birth of John, the first-born, his remainder as the first tenant in fee tail, which was before contingent, became vested in interest, and he was thereafter seized of an estate tail in remainder, the vesting in possession being dependent upon the termination of the life estate.

The interest in the estate in remainder in which they vested immediately on his birth carried with it a fixed right of future enjoyment in possession, the instant the life estate terminated.

The question upon this branch of the case is, whether or not the estate in fee tail in remainder thus acquired under the will of John Van Rensselaer was converted into a fee simple absolute in John, the first-born son of John J., by the operation of the act of 1786, abolishing entails.

The act provides that if any person shall thereafter "become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise," &c., he shall be deemed to have become seized in fee simple absolute. * * *

This being regarded as the true construction of the act of 1786, it follows that John, the first-born son of John J., took an estate in fee simple absolute in remainder in the premises; and that on his death, in 1813, it descended, according to the law of New York, to his father, the life tenant; and the two estates being thus united in him, he became vested with the whole estate in fee simple absolute.

The complainant, therefore, has failed to make out any estate in the premises under the will of John Van Rensselaer. And can claim title only through his father, John J., as one of the heirs of his estate.

The tract of land in question embraces between thirty-three and thirty-four thousand acres, and on the 1st of January, 1795, John J., the life tenant, sold and conveyed the same in fee to Daniel Penfield, for the consideration of \$44,550.

It is more than probable it was the opinion of the profession in New York, at the date of this conveyance, that John J., the grandson, took an estate in fee tail under the will of his grandfather, within the rule in *Shelley's case*, which the act of 1786 had turned into a fee

simple absolute; and that the purchase was made under the belief that he was competent to convey the fee.

It is admitted, however, that this construction, which may have been given at the time, was a mistaken one; and that he took only an estate for life, which terminated on his death, the 26th of September, 1828. At that time, we have seen, he was seized of the whole estate in fee in consequence of the death of his eldest son, the first-born tenant in fee tail in 1813, and which descended to his four children, three sons and a daughter, as tenants in common, of whom the complainant is one, unless they are estopped from setting up the title by the deed of the 1st of January, 1795, to Penfield, under whom the defendants hold. * * *

But independently of this view, and of any covenants of title, in the technical sense of the term, in the deed of 1st January, 1795, we are of opinion that the complainant is estopped from denying that John J. Van Rensselaer, the grantor, was seized of an estate in fee simple at the date of that deed, the grounds of which opinion we will now proceed to state.

The general principle is admitted, that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. (7 How. 159; 2 Sugden on Vendors, ch. 12, 2, p. 421; 2 Kent's Comm. 473; 4 Ib. 471, note; 1 Cow. 616; 9 Cow. 1; 4 Wend. 622; 7 Conn. 256; 11 Wend. 110; S. C. 13 Wend. 78; 12 Pick. 78; 1 Rev. Stat. N. Y. 739, 143, 145; 15 Pick. 23; 14 Johns. 193.

A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title.

But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then,

although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance.

The authorities are very full on this subject. *Goodtitle v. Bailey*, Cowp. 601; *Bensley v. Burdon*, 2 Sim. & Stu. 524; -S. C., 5 Russell, 330; 2 Barn. & Ad. 278, where this case is referred to; *Doe ex dem. Marchant v. Ewington*, 8 Scott, 210; *Rees v. Lloyd*, Wightwick, 129; *Bowman v. Taylor*, 2 Ad. & Ellis, 278; *Lainson v. Tremere*, 1 Ib. 792; *Stone v. Wise*, 7 Conn. 214; *Penrose v. Griffith*, 5 Binney, 231; *Denn v. Cornell*, 3 Johns. Cas. 174; 8 Cow. 586; *Carver v. Jackson ex dem. Astor*, 4 Peters, 1; 7 Greenl. 96; 4 Kent's Com. 271, note; 1 Smith's Leading Cases, p. 450, note to the *Duchess of Kingston's* case.

In the case of *Bensley v. Burdon*, the party granting the estate recited that he was entitled to a remainder in fee, expectant upon the determination of the life estate of his father, in certain premises therein described. In point of fact, he had no interest in the premises at the time; but became vested with an estate for life in a part of them some two years afterwards, under the will of his father, and soon after conveyed this interest to the defendant.

The Vice-Chancellor held, that the grantor having averred in the deed that he was seized of a remainder in fee, expectant on the death of his father, he was estopped from setting up, that, at the time of the grant, he was not duly seized of the estate according to the averment; that the estoppel run with the land, and bound not only the grantor, but all claiming under him; and that the defendant was, therefore, equally estopped from denying the title.

There was an appeal in this case to the Lord Chancellor, and his decision is referred to as reported in 5 Russell, 330; but there is an error in the reference, and I have not been able to find it.

But in *Right ex dem. Jefferys v. Bucknell* (2 Barn. & Ad. 281), Lord Tenterden refers to the case, and says that the judgment of the Vice-Chancellor was affirmed, and that the Chancellor put his decision on the ground, that the recital of the interest of the grantor in the premises was an averment of a particular fact, by which the defendant was concluded.

And in the case of *Doe ex dem. Marchant v. Ewington*, which was an action of ejectment to recover possession of a set of chambers in

Lincoln's Inn, it appeared that one Boileau, having been admitted by the Benchers of the society, the owners of the fee, to the chambers for life, had granted the same to the lessor of the plaintiff in trust to secure an annuity, reciting in the deed that he was well entitled to an estate for life in the chambers.

Afterwards Boileau, by an arrangement with the defendant, surrendered to him the possession of the chambers, who continued to occupy them at the time of the commencement of the suit, which was brought in consequence of the annuity being in arrear.

By the regulations of society, it appeared that, in order to surrender possession, the person last admitted must present a petition to the Masters of the Bench for permission to surrender, first paying all his arrear of dues; and the person who is to succeed must also present a petition to be admitted; and thereupon, if consent be given, then an order is entered that the person admitted may have leave to surrender, and the person who is to succeed may be admitted on paying the fine and fees. And that it is in the discretion of the masters, for the time being, to make such orders for the admission to or exclusion from chambers in the Inn as they may think fit.

The lessor of the plaintiff sought to recover on the ground that Boileau was estopped from denying that he was seized of an estate for life in the chambers by the recital in his conveyance; and that the defendant coming in under him was equally estopped.

TINDALL, C. J., in giving judgment, observed, that the case had very properly been argued on the ground of estoppel; for if it were a question of title, the lessor of the plaintiff would clearly be out of court. That he must claim under the estoppel created by the recital in the deed of conveyance. He admitted that Boileau was bound by the recital; and the defendant also, if in privity of estate; that, according to the old authorities, he must either come in the per or the post, that is, he must claim from, through, or under the party. That the defendant did not claim under Boileau, but under the trustees of the society of Lincoln's Inn, and therefore was not estopped from denying the title.

COLTMAN, J. observed, that, as between Boileau and the lessor of the plaintiff, the former might be estopped from denying that he had the estate he represented by his deed; but that, to enable the plaintiff to succeed, it was necessary for him to show that the defendant claimed through or under Boileau, so that the estoppel should affect him.

In the case of *Bowman v. Taylor*, Lord Denman, C. J., observed,

that, "as to the doctrine laid down in Co. Litt. 352 b, that a recital doth not conclude, because it is no direct affirmation, the authority of Lord Coke is a very great one; but still, if a party has by his deed recited a specific fact, though introduced by a 'whereas,' it seems to me impossible to say that he shall not be bound by his own assertion so made under seal."

And TAUNTON, J. remarked, in the same case, that the law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that, where, a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted.

In the case of *Fairbanks v. Williamson*, there was no covenant of title in the deed, which was in fee; but the grantor covenanted that neither himself, his heirs, or assigns, would ever make any claim to the premises. The court held that this operated as an estoppel, not only upon him, but upon all claiming under him, from setting up an after-acquired title to the land against the grantee or those in privity with him.

In *Jackson ex dem. Munroe v. Parkhurst et al.*, 9 Wend. 209, the recovery was placed altogether on the ground of estoppel, the defendant holding under the grantor of the deed in which the title was recited. And in *Right ex dem. Jefferys v. Bucknell*, where the recital in the deed was, that the grantor was legally or equitably entitled to an estate in fee in the premises, the court refused to bind the party coming in under him as a purchaser for a valuable consideration of the after-acquired title, solely on the ground that there was no certain and precise estate set forth in the recital.

The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies.

The reason is, that the estate thus affirmed to be in the party at the

time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it.

The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money.

It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when the conscience and honesty he should not be allowed to speak.

Now, applying this doctrine to the case in hand, our next inquiry will be, whether or not John J. Van Rensselaer affirmed, in his deed of January 1, 1795, to Penfield, that he was seized of an estate in fee in the premises, and whether the deed purports on its face to convey an estate of that description

As to the question involved in the latter branch of the inquiry, we need only refer to the words of the grant to determine it. The deed is of all the right, title, and interest of the grantor in the tract of land to Penfield, his heirs and assigns forever, terms that would have passed an estate in fee, if John J. had been seized of it at the time of the conveyance.

The most important question arises upon the other branch of the inquiry. Has the grantor affirmed on the face of the deed that he was seized of this particular estate in the premises at the time he made the grant?

The argument on the part of the complainant is, that, although the granting words of the deed are broad and comprehensive,—such as, “have granted, bargained, sold, aliened, enfeoffed, assured, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, assure, release, and confirm unto the said Daniel Penfield,” “and to his heirs and assigns forever, all and singular the aforesaid tract of land,” &c., “and also all leases of and concerning any part or parts of the said granted premises; and also all the estate, right, title, interest, property, possession, claim, and demand of them, the said

John J. Van Rensselaer and Catherine, his wife, in the same,"—yet the grant is qualified by the *habendum* clause,—“to have and to hold the said tract of land so described, and so butted and bounded as above recited, &c., unto the said Daniel Penfield, his heirs and assigns, to the only proper use and behoof of the said Daniel Penfield, his heirs and assigns forever, in as full and ample a manner as the said John J. Van Rensselaer now hath and enjoyeth the same, and in as full and ample a manner as the same hath heretofore been had and enjoyed by the said John J. Van Rensselaer, or lawfully might, if these presents were not made, be had, used, occupied, or enjoyed by him, his heirs or assigns.”

This latter clause, it is supposed, restricts and qualifies the general words in the grant, and confines the effect and operation of the deed to the conveyance of such an estate as the grantor was seised and possessed of at the time; and, as this was an estate for life with remainder over, it operated, and was intended to operate, to convey only this estate.

Were there nothing else in the case, there might be much difficulty in furnishing a satisfactory answer to this view, although no one, we think, can read the deed without being strongly impressed with the conviction, that both parties supposed they were dealing with the fee, and that the bargain was made upon that understanding.

But, in order fully to comprehend and interpret this qualifying clause in the *habendum*, it is material to look into the nature and condition of the title at the time, and the mode of enjoying the estate, and also into the evidences of the title which were turned over to the purchaser at the execution of the contract, all of which appear in the deed and articles of agreement therein recited and referred to.

As we have already said, in another branch of the case, a part of the tract had been previously conveyed in fee, and amongst others by the grantor himself, and which is excepted from the grant. Much the larger part was at the time in the occupation of tenants under leases in fee, or for the lives of the lessees, with rents reserved, made, amongst others, also by John J., which leases were transferred to Penfield as muniments of the title. The articles of agreement provided for the transfer of these leases, and the deed itself in terms embraces them in the granting clause.

In the articles of agreement, also, Penfield is required to covenant that he will execute leases, according to the terms and conditions upon which they had been usually granted, of certain portions of the tract to several persons therein named; and which leases, as we have seen,

according to the custom of granting, were to be made in fee, or for the lives of the lessees. The deed also contains the recital of a mortgage in fee upon the estate, given by John J., the 11th August, 1791, to Schuyler, for securing the payment of \$7,750, which Penfield was to discharge out of the purchase-money.

Now all these instruments affecting the title, and showing the tenure and conditions by and under which the estate was held and enjoyed, are particularly referred to in the articles, and in the deed of conveyance, and are thus virtually incorporated into the same; and were so for the purpose of describing with greater precision the nature and condition of the title, and of the rights and interests of the grantor in the tract conveyed. And looking at them, and at the right and title therein asserted and affirmed, and upon the faith of which the purchase was made and the deed taken, we shall be enabled to comprehend and give proper application to the words in the *habendum*; namely, that the grantee, his heirs, and assigns, shall hold in as full and ample a manner as the same is possessed, occupied, and enjoyed by the grantor, or as might be possessed and enjoyed by him, his heirs and assigns, if these presents had not been made.

Admit that the clause refers to the title and estate possessed by the grantor, as well as to the premises described, what title and estate? Manifestly that which is evidenced by the muniments of title before referred to, and particularly identified and described in the granting clause of the deed, a title evidenced by leases in fee with rent reserved, made by John J. and his ancestors, and which passed to the grantee as securing the rents and profits issuing out of and belonging to the estate conveyed.

These leases characterize the title to the tract sold, and afford evidence that cannot be mistaken of the estate intended to be conveyed, and it was the enjoyment of this estate and interest in the premises, in the manner and way in which the grantor had used, occupied, and enjoyed the same, to which the *habendum* clause refers. This affords a full explanation of its object and meaning.

The reference to these leases, and virtual incorporation of them into the deed, and transfer as muniments of the title, especially those made by John J. himself, together with the mortgage in fee to Schuyler which was to be raised out of the purchase-money and the covenants required of Penfield to grant similar leases to certain persons named, all clearly import, on the face of the instrument, an assertion, or affirmation on the part of the grantor that he was seized of a title that enabled him to make the leases and mortgage, and that

would also enable Penfield to grant similar leases, namely, leases in fee; and which brings the case directly within the principle of law already stated, that estops him, and those coming in under him, from denying that he was so seized.

The estoppel works upon the estate, and passes with it, and binds the title subsequently acquired by the death of his eldest son, the first-born tenant in tail.

We are satisfied, therefore, after the fullest consideration of the case, that the decree of the court below is right, and should be affirmed.

VEVE Y DIAZ v. SANCHEZ.

226 U. S. 234; 57 L. Ed. 201; 33 Sup. Ct. 36. (1912)

MR. JUSTICE LAMAR delivered the opinion of the court.

* * * Following the descriptive clause in the mortgage was a statement that Sanchez was the owner of the land. In addition to this recital, which, according to *Van Rensselaer v. Kearney*, 11 How. 322-326, 13 L. ed. 713-715, would be equivalent to a covenant of warranty and ownership, it was claimed that, under the laws of Porto Rico (P. R. Civ. Code, 1474), a warranty was implied in all conveyances of real estate. Apparently, in accordance with this view, the judicial deed, made in pursuance of the foreclosure sale, contained a provision that "the debtor, Jose Avalo Sanchez, remains bound under the present sale to guarantee the title in accordance with law." These facts estopped Sanchez from denying that he had the right to dispose of all the property which the mortgage purported to convey. For, having received the money on the faith of the statement that he was the owner of the property, he was bound to repay that sum; or, failing that, to perfect the title on which the money had been advanced. So that when he acquired what is now called Sauri, but which had been originally included in the land conveyed by the mortgage, the title inured to the benefit of his vendee. *Amonett v. Amis*, 16 La. Ann. 225; *Lee v. Ferguson*, 5 La. Ann. 533; *Stokes v. Shackelford*, 12 La. 172; *New Orleans v. Riddell*, 113 La. 1051, 37 So. 966; *Partida v. Tv. L.* 51; *Ib. T. XIII, L.* 50; *Van Rensselaer v. Kearney*, 11 How. 322-326, 13 L. Ed. 713-715; *Bush v. Person*, 18 How. 85, 15 L. ed. 274; *Moore v. Crawford*, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447.

Judgment reversed,

RAUCH v. DECH.

116 Pa. St. 157; 2 Am. St. Rep. 598; 9 Atl. 180. (1887)

* * * GORDON, J. This was a *scire facias* to revive the lien of a judgment obtained on a mortgage, and which lien had been discharged by a sale of the premises by a judicial sale on a previous mortgage. This sale seems to have been made by the sheriff to C. A. Luckenbach, on the 15th of June, 1878; and subsequently, June 1, 1882, the executors of Luckenbach, for a full consideration, conveyed the premises to James K. Rauch, the defendant in the present suit. The court below seemed to think that, because there had been a reacquisition of the mortgaged property by the defendant, the lien of the discharged mortgage had been thereby revived; hence entered judgment on the demurrer for the plaintiff. This was a mistake; a result such as this could only arise by way of estoppel. When a vendor or mortgagor either sells or mortgages land which he does not own, and afterwards obtains the title thereto, he will not be permitted to set up this after-acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor. But there is nothing of the kind in the case before us; for it is not pretended that Rauch mortgaged to Dech land to which he had no title, or that he was guilty of any species of fraud whereby Dech was deceived. The plaintiff's lien was lost by force of legal process, and it is not even intimated that Luckenbach's title was not taken clear of that lien. In the meantime, and before the date of the deed of the executors to the defendant, he had received his discharge in bankruptcy; so that, at that time, he was not even the debtor of the plaintiff. It thus follows that, so far as Dech and his mortgage were concerned, Rauch, at the time of his purchase, occupied the position of a stranger. To hold, therefore, that that purchase worked a revival of the extinguished debt and mortgage was a clear mistake, without the shadow of authority for its support.

The judgment of the court below is now reversed, and it is ordered that judgment be entered on the demurrer for the defendant.

KIRK v. HAMILTON.

102 U. S. 68; 26 L. Ed. 79. (1880)

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

It appears from the first bill of exceptions that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clark and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22d of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of *Moore & Co. v. Kirk, &c.*, at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the court subject to those exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain their defence, and to prove title out of the plaintiff, offered to read in evidence the record of the equity suit of *Moore & Co. v. Kirk, &c.* Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on defendants' behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defence, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of *Moore & Co. v. Kirk, &c.*, the only improvement thereon was a two-story four-room brick house, and that, about the year 1868, the defendants erected an extensive building on the property, at a cost of some \$4,000; that when they began such building, and for some time thereafter, the plaintiff Kirk resided on the adjoining prem-

ises; that during all that time he well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining his ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and lastly, that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendants' knowledge, until the commencement of this action, asserted any claim to the premises in dispute.

At that stage of the trial the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to defendants putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who rendered a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general question whether the sale by Carrington, as trustee, on the 19th of April, 1864, was or was not, upon the face of the record of *Moore & Co. v. Kirk, &c.*, a mere nullity. Its validity is assailed by the plaintiff on various grounds, the most important of which seem to be: 1. That as *Moore & Co.*, sued in their own behalf only, and not for the benefit of themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale (of lot No. 78), which raised an amount largely in excess of the claims for which *Moore & Co.*, sued. 2. That the utmost which the court, upon the pleadings, could do, was to distribute such excess among the other creditors of *Kirk* who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by Carrington, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to *Hamilton*, were absolutely null and void.

In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co. v. Kirk, &c.*, was, of itself, insufficient in law to divest *Kirk* of title to the premises in dispute, or to invest *Hamilton* with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defence to the present action.

After the confirmation of the sale of April 19, 1864, before any

deed had been made, and while the cause was upon reference for a statement, as well of the trustee's accounts as for distribution of the fund realized by the sales, Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question upon this branch of the case is whether, consistently with the authorities, the defence is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral

declarations. "What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johns. (N. Y.) Ch. 344: "There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." P. 354.

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

In *The King v. The Inhabitants of Butterson* (6 Durnf. & E. 554), MR. JUSTICE LAWRENCE said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."

In 2 Smith Lead. Cas., pp. 730-740 (7th Am. ed. with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law.

Again (pp. 733, 734): "The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible, to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by

a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change, through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

This question in a different form was examined in *Dickerson v. Colgrove*, 100 U. S. 578. That was an action of ejectment, and the defence, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the facts recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a

knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted.

The evidence upon this point was properly admitted, and operated to defeat the action independently of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was, itself, a valid, binding transfer of the title to the purchaser.

What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions.

CHAPTER XXX.

EMINENT DOMAIN.

PUMPELLE v. GREEN BAY CO.

13 Wall. (U. S.) 166; 20 L. Ed. 557. (1871)

MR. JUSTICE MILLER delivered the opinion of the court.

* * * The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practice of our ancestors.

In the case of *Sinnickson v. Johnson*, the defendant had been authorized by an act of the legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.

In the case of *Gardner v. Newburgh*, Chancellor Kent granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendants' counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. And perhaps no State Court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a taking as required compensation under the Constitution. As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams. * * *

PEABODY v. UNITED STATES.

231 U. S. 530; 58 L. Ed. 351; 34 Sup. Ct. 159. (1913)

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a judgment of the court of claims, dismissing petitions for compensation for land alleged to have been taken by the United States for public use. 46 Ct. Cl. 39. Separate suits were brought by Samuel Ellery Jennison, the owner, at the time the taking is said to have occurred, by his mortgagees, Mary R. Peabody and the Saco & Biddeford Savings Institution, and by his grantee, the Portsmouth Harbor, Land, & Hotel Company. These suits were consolidated and the merits were heard. The following facts are shown by the findings:

The land in question, comprising about 200 acres, forms the southern corner of Gerrish island, the southernmost point on the coast of Maine. It lies about 3 miles from Portsmouth, bordering on

the south and east the Atlantic ocean, and on the west the entrance to Portsmouth harbor. Its value consists almost entirely in its adaptability for use as a summer resort, and it had been improved for this purpose by the erection of a hotel, cottages, outbuildings, and pier, by the construction of roads, and by the provision of facilities for summer recreations.

In 1873, long before Jennison acquired title and improved the property, the United States began the construction of a twelve-gun battery upon a tract of 70 acres lying north and west of the land in suit and abutting upon it. This battery was to be one of the outer line of defenses of Portsmouth harbor, for which appropriation had been made by the act of February 21, 1873, 17 Stat. at L. 468, chap. 175. See also act of April 3, 1874, 18 Stat. at L. 25, chap. 74. By the year 1876, a large sum had been expended upon the work, which had reached an advanced stage of construction. Operations were closed in September of that year, however, for want of funds, and the fortification was not occupied by the United States thereafter until work was resumed in 1898. The government then constructed on the same site a battery consisting of three 10-inch guns and two 3-inch rapid fire guns. It was practically completed on June 30, 1901, and was transferred to the artillery on December 16, 1901, being named Fort Foster.

No part of the fort encroaches upon the land in suit; the fort is within 200 feet of its northwestern corner and about 1,000 feet from the hotel. The claimants' land lies between the fort and the open sea to the south and southeast; and the guns have a range of fire over all the sea front of the property. As the government reservation on its western side borders the entrance to the harbor, the court found that there was an available portion of the shore belonging to the reservation which permitted the firing of the guns in a southwesterly direction "for practice and for all other necessary purposes in time of peace" without the projectiles passing over the land in question. This conclusion was reached by applying the local law governing the boundary lines of contiguous proprietors where there is a curvature of the shore. *Emerson v. Taylor*, 9 Me. 42, 23 Am. Dec. 531. It may be noticed here that the petitioners insist that the guns could not be fired over the narrow area thus found to be a part of the reservation without endangering life and property along the New Hampshire coast, and they present in their brief a map to support their assertion. The government urges that this map has not been identified and is wholly incompetent; and that, as the question is one of fact, the finding must be deemed conclusive. But while thus finding that there was a line

of fire available to the government over its own shore property, the court also found that the most suitable field of fire for practice and other purposes in time of peace would be over the claimants' land.

On or about June 22, 1902, two of the guns were fired for the purpose of testing them at a target off the coast, the missiles passing over the land in suit; and another gun was fired for the same purpose and to the same effect on September 25, 1902, the resulting damage to buildings and property amounting to \$150.

None of the guns has been fired since, but they have been kept in good condition by a detail from Fort Constitution, which is situated across the Piscataqua River. The court below further states in its findings that "it does not appear from the evidence that there is any intention on the part of the government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof, or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do, and the further fact that they were so fired upon the occasions as hereinbefore found."

In the year 1903 and 1904, the hotel, which had previously been profitable, was conducted at a loss; since 1904, it has been closed and the cottages have been rented only in part and at reduced rates. It is found that the erection of the fort and the installation of the guns have materially impaired the value of the property, and that this impairment will continue so long as the fort and artillery are maintained. This is found to be due to the apprehension that the guns will be fired over the property.

The question is whether, upon this showing, the petitioners were entitled to recover.

It may be assumed that if the government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the government to fire projectiles directly across it, for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a "taking" within the principle of the decisions (*Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall.

166, 177, 178, 20 L. ed. 557, 560; *United States v. Lynah*, 188 U. S. 445, 469, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349; *United States v. Welch*, 217 U. S. 333, 339, 54 L. ed. 787, 789, 28 L. R. A. (N. S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680.), and not merely a consequential damage incident to a public undertaking, which must be borne without any right to compensation (*Northern Transp. Co. v. Chicago*, 99 U. S. 635, 642, 25 L. ed. 336, 338; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton v. Wheeler*, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; *Bedford v. United States*, 192 U. S. 217, 224, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238; *Jackson v. United States*, 230 U. S. 1, 23, 57 L. ed. 1363, 1374, 33 Sup. Ct. Rep. 1011).

But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the government to impose it. The suit must rest upon contract, as the government has not consented to be sued for torts, even though committed by its officers in the discharge of their official duties. (*Gibbons v. United States*, 8 Wall 269, 275, 19 L. ed. 453, 454; *Langford v. United States*, 101 U. S. 341, 343, 25 L. ed. 1010, 1011; *Schillinger v. United States*, 155 U. S. 163, 169, 39 L. ed. 108, 110, 15 Sup. Ct. Rep. 85; *Russell v. United States*, 182 U. S. 516, 530, 45 L. ed. 1210, 1215, 21 Sup. Ct. Rep. 899; *Harley v. United States*, 198 U. S. 229, 234, 49 L. ed. 1029, 1030, 25 Sup. Ct. Rep. 634); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property (*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656, 657, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306).

The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired or because of a depreciation in its value, due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.

The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit, and hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the government's portion of the

shore, in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910, and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear, but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated, and that the government has thus impliedly agreed to pay for it.

BRAGG v. WEAVER.

251 U. S. 57; 40 Sup. Ct. 63. (1919)

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the state (Pollard's Code 1904, section 944a, clauses 21 and 22.) Whether the statute denies to the

owner the due process of law guaranteed by the Fourteenth Amendment is the federal question in the case. It was duly presented in the state court and, while no opinion was delivered, the record makes it plain that by the judgment rendered the court resolved the question in favor of the validity of the statute.

It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

(1) Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853; *Adirondack Ry. Co. v. New York*, 176 U. S. 335, 349, 20 Sup. Ct. 460, 44 L. Ed. 492; *Séars v. City of Akron*, 246 U. S. 242, 251, 38 Sup. Ct. 245, 62 L. Ed. 688.

(2) But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Backus v. Fort Street Union Depot Co.*, *supra*, 169 U. S. p. 569, 18 Sup. Ct. 445, 42 L. Ed. 853. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. *Lent v. Tillson*, 140 U. S. 316, 326, *et seq.* 11 Sup. Ct. 825, 35 L. Ed. 419; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 537, 16 Sup. Ct. 83, 40 L. Ed. 247; *Wells Fargo & Co. v. Nevada*, 248 U. S. 165, 168, 39 Sup. Ct. 62, 63 L. Ed. 190. And see *Capital Traction Co. v. Hof*, 174 U. S. 1, 18-30, 45, 19 Sup. Ct. 580, 43 L. Ed. 873.

(3, 4) With these principles in mind we turn to the statute in question. By clause 21 it authorizes certain officers engaged in re-

pairing public roads to take earth for that purpose from adjacent lands, and by clause 22 it declares:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of section three of this act, shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

The same statute, in clause 5, deals with the compensation to be paid for lands taken for roadways, and in that connection provides that the proprietor or tenant, if dissatisfied with the amount allowed by the supervisors, "may of right appeal to the circuit court of said county, and the said court shall hear the matter *de novo*" and determine and certify the amount to be paid. And a general statute (section 838), which regulates the time and mode of taking appeals from decisions of the supervisors disallowing claims in whole or in part, provides that the claimant, if present when the decision is made, may appeal to the circuit court within thirty days thereafter, and if not present, shall be notified in writing by the clerk and may appeal within thirty days after service of the notice.

Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so for the purposes of this case we must construe them. The task is not difficult. The words employed are direct and free from ambiguity, and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers, that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal lies as of right to the circuit court where the matter may be heard *de novo*. Thus, by exercising the right to appeal the owner may obtain a full hearing in a court of justice—one concededly possessing and exercising a general jurisdiction. An oppor-

tunity to have such a hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Under the statute the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the initiative—as they do in many instances—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22 taken together provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision, and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when section 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the Legislature provides otherwise. Here the Legislature has not provided otherwise, and so has indicated that it is content to have the general statute applied. As before stated, that statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begins to run at once. It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the circuit court.

(5) The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment

of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet v. Rechel*, 159 U. S. 380, 402, 407, 16 Sup. Ct. 43, 40 L. Ed. 188; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853; *Williams v. Parker*, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559; *Crozier v. Krupp*, 224 U. S. 290, 306, 32 Sup. Ct. 488, 56 L. Ed. 771. And see *Branson v. Gee*, 25 Or. 462, 36 Pac. 527, 24 L. R. A. 355. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

Judgment affirmed.

BOTHWELL et al. v. UNITED STATES.

254 U. S. 231; 41 Sup. Ct. 74. (1920)

Suit by Albert J. Bothwell and another against the United States. From a judgment of the Court of Claims (54 Ct. Cl. 203) for an insufficient amount, the claimants appeal. Affirmed.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Appellants owned and utilized in their business of stock raising a large tract of land lying in Sweetwater Valley, Wyo. In June, 1909, much hay was stored upon the land and a thousand head of cattle were there confined. Under the Reclamation Act of June 17, 1902 (32 Stat. 389, c. 1093, 7 Comp. St. 4706), the United States constructed the Pathfinder Dam. This arrested the flood waters and caused inundation of appellant's lands. The hay was destroyed, and it became necessary to remove the animals and sell them at prices below their fair value.

Proceedings to condemn the land were instituted by the appellee, in the United States Circuit Court for Wyoming before the overflow. It is said the right to enter was not acquired until thereafter. The value of the land was ascertained and paid, but the court denied appellants' claim for the hay, and for loss consequent upon forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for value of the hay only, and the cause is here upon claimants' appeal.

Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require." *United States v. Cress*, 243 U. S. 316, 329, 37 Sup. Ct. 380, 385 (61 L. Ed. 746). But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation. We need not consider the effect of the judgment in the condemnation proceedings. * * *

The judgment below is affirmed.

CHAPTER XXXI.

NOTICE, PRIORITY AND RECORDING.

- Section 1. Equitable Doctrine of Priority.
- Section 2. Effect of Recording.
- Section 3. Sufficiency of Record.
- Section 4. Notice from Possession.

SEC. 1. EQUITABLE DOCTRINE OF PRIORITY.

DUNCAN TOWNSITE CO. v. LANE.

245 U. S. 308; 62 L. Ed. 309; 38 Sup. Ct. 99. (1917)

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

* * * The claim which the relator makes in this court rests wholly upon the fact that the relator was a *bona fide* purchaser for value. But the doctrine of *bona fide* purchaser for value applies only to purchasers of the legal estate. *Hawley v. Diller*, 178 U. S. 476, 484, 20 Sup. Ct. 986, 44 L. Ed. 1157. It "is in no respect a rule of property, but a rule of inaction." *Pomeroy*, *Equity Jurisprudence*, 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone v. Chiles*, 10 Pet. 177, 210, 9 L. Ed. 388.

* * *

SAMPEYREAC AND STEWART v. THE UNITED STATES.

7 Pet. (U. S.) 222; 8 L. Ed. 665. (1833)

MR. JUSTICE THOMPSON delivered the opinion of the court.

This case comes up on appeal from the superior court in the territory of Arkansas.

The decree of the court was founded upon proceedings instituted under an act of congress, entitled "an act for further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th of May, 1824, and for other purposes," passed the 8th of May, 1830. Pamph. Laws, ch. 90. * * *

Upon the proceedings on the bill of review instituted under this act, the court pronounced the following decree: "It is therefore adjudged, ordered and decreed that the former decree of this court, in favour of the defendant Bernardo Sampeyreac against the United States, for four hundred acres of land, pronounced and recorded at the December term of this court in the year 1827, be, and the same is hereby, reversed, annulled and held for naught." From this decree the present appeal was taken.

To a right understanding of the questions which have been made at the bar, it will be necessary briefly to state the proceedings which took place under the original bill.

That bill or petition was filed on the 21st of November, 1827, under the provisions of the act of the 26th of May, 1824, (7 Laws U. S. 300), setting forth that the complainant, Bernardo Sampeyreac, on the 6th of October, 1789, he then being an inhabitant of Louisiana, presented a petition to the then governor of the province, asking a grant for a tract of land in full property, containing ten arpens in front, by the usual depth, on Strawberry river, &c. That afterwards, on the 11th of October, 1789, the governor granted the petition. That at the time the grant was so made, an order of survey was issued to the surveyor general of the province. That by virtue of such grant and order of survey, the petitioner acquired a claim to the land; which claim is secured to him by the treaty between the United States and the French republic, of the 30th of April, 1803.

The district attorney put in an answer, denying the several facts and allegations in the bill; and alleging that grants could only be made, legally, to persons in existence and actually residing in Louisiana. That Sampeyreac, in whose name the bill is filed, is a fictitious person, never having had any actual existence; or, if such person ever had any existence, he was a foreigner, or is now dead, and made no transfer or assignment of the claim in his lifetime. That he has no legal representative in existence; nor is there anyone now living who is authorized to file this bill, or prosecute this suit; and prayed that the bill might be dismissed.

A witness by the name of Heberard was examined, and sworn to all the material facts necessary to establish the claim; and the court, there-

upon, ordered, adjudged and decreed that the said Bernardo Sampeyreac, recover of the United States the said four hundred arpens of land.

The bill of review is founded upon the allegation that the original decree was obtained by fraud and surprise. That the original petition and order of survey, exhibited in the case, are forged. That Heberard and the other witnesses in the cause, committed the crime of perjury. That the order of survey was never signed by Mero, governor of Louisiana, as the same purports to have been; and that this fact has come to the knowledge of the district attorney since the decree was entered. And the bill further charges that the said Sampeyreac is a fictitious person.

At the October term, 1830, this bill was taken, *pro confesso*, against Sampeyreac; at which term the appellant, Joseph Stewart, appeared in court, and prayed to be made a defendant, and have leave to file an answer to the bill. This was resisted by the district attorney; but an order was made by the court permitting Stewart to be made a defendant, with leave to file an answer. To which the district attorney excepted.

The answer of Stewart denies the frauds and forgeries alleged in the bill, but avers that if there was any fraud, corruption or forgery, he is ignorant of it; and that he was a *bona fide* purchaser of the claim for a valuable consideration from one John J. Bowie, who conveyed to him the claim of the said Bernardo Sampeyreac, by deed bearing date about the 22d of October, 1828. Upon the final hearing the court reversed the original decree, as has been already stated. * * *

4. The next inquiry is, whether the appellant, Stewart, has acquired a right to the land, by reason of his standing in the character of a *bona fide* purchaser. The record contains an admission on the part of the United States, that he purchased the claims of John J. Bowie, by deed, for a valuable consideration, in good faith, some time in November or December, 1828. But this gave him no right to be let in as a party in the bill of review; he was not a party to the original bill, nor could he connect himself with Sampeyreac, the only party to the bill, he being a fictitious person; and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was, therefore, a perfect stranger to that decree. The deed purporting to have been given by Sampeyreac to Bowie, is admitted to be a forgery. Bowie, of course, had no interest, legal or equitable, which he would convey to Stewart. But admitting Stewart to have been properly let in as a party in the bill of review, the only colourable equity which he

showed, was the certificate of entry given by the register of the land office, December 13th, 1828; and this certificate, founded on a decree in favour of Sampeyreac, a fictitious person, obtained by fraud, and upon forged evidence of title. This certificate is entirely unavailable to Stewart. He can obtain no patent under it if the original decree should remain unreversed; for the act of 1830 forbids any patent thereafter to be issued, except in the name of the original party to the decree; and on proof to the satisfaction of the officers, that the party applying is such original party, or is duly authorized by such original party or his heirs to receive such patent. The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States. But Stewart acquired no right whatever under the deed from Bowie, the latter having no interest, that he could convey. In the case of *Polk's Lessee v. Wendall*, 5 Wheat. 308, it is said by this court, that on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void grant, can acquire nothing.

Upon the whole, we think Stewart was improperly admitted to become a party; but considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.

The decree of the court below is accordingly affirmed with costs.

SEC. 2. EFFECT OF RECORDING.

WARNOCK v. HARLOW.

96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166. (1892)

HAYNES, C. On May 4, 1881, W. W. Brison was the owner of the lands described in the complaint, and on that day conveyed the same to his wife, Carrie M. Brison. On September 15, 1886, W. W. Brison commenced an action against his wife, the object of which was to obtain a decree declaring that she held the title to said lands in trust for himself, and to compel a reconveyance, and at the same time filed a *lis pendens* in the recorder's office.

On November 22, 1888, a decree was entered in said cause, requiring Mrs. Brison to execute such conveyance within ten days, and in default thereof, directing the clerk of the court to execute such deed in her name, and such deed was made and delivered by the clerk on December 5, 1888, and recorded on the same day.

On November 29, 1888, after the entry of said decree, and before the execution of the deed by the clerk, W. W. Brison conveyed the land mentioned to the defendant Catlin, one of the respondents herein.

On September 15, 1886, some four or five hours before the suit of Brison v. Brison was commenced, and before the *lis pendens* was filed, Mrs. Brison conveyed the same land to appellant, W. P. Harlow, but which deed was not recorded until August 15, 1887.

The plaintiff in this action, W. E. Warnock, was the lessee of the same land from Mrs. Brison from October 1, 1885, for one year, and again for a second year, ending October 1, 1887, and paid the rent to her. From October 1, 1887, up to October 1, 1890, Warnock was tenant of the same land under a lease from Harlow, and for the first year paid the rent to Harlow. The rent for the second and third years is the subject of this controversy.

The respondent, Catlin, after the said deed from W. W. Brison was executed to him, notified plaintiff thereof and demanded the rent; whereupon the plaintiff commenced this action against Harlow and Catlin, setting out the claim and source of title to each, that each of the defendants claimed to be entitled to the rent due from him, and paid the money into court, and required that they interplead, and that the money be paid to whichever party the court should direct.

Defendant Catlin answered, admitting the facts alleged in the complaint, denied that Harlow was entitled to receive the rents, and alleged that he, Catlin, was entitled thereto.

Defendant Harlow, in his answer, among other allegations not necessary to be noticed at present, alleged that the title which he has, and had at the time he leased to the plaintiff, was derived by him under a deed from said Carrie M. Brison, dated September 15, 1886, but which was executed and delivered to him before the action of Brison v. Brison was commenced, and before the filing of the *lis pendens*. "and that at the time of the commencement of said action of Brison v. Brison, and at the time of the filing and recording of the said notice of the pendency of the action, he was the owner, in the possession, and entitled to the possession, of said land."

The cause was tried by the court, and findings and judgment passed in favor of defendant Catlin, and defendant Harlow appealed upon the judgment roll. * * *

It is obvious, however, that the decisive point in the case lies beyond the question above considered, and must first be determined.

The deed made in 1881 by W. W. Brison to his wife undoubtedly vested in her the legal title to the land; and as between those parties,

the judgment finally rendered in the case of *Brison v. Brison*, November 22, 1888, is conclusive of the fact that said deed, though purporting to convey an unqualified ownership and title, vested in Mrs. Brison the title, in trust for her husband.

It is contended by respondent Catlin that Harlow, the grantee of Mrs. Brison, though the deed under which he claims was executed and delivered to him before suit was commenced against her, and before the notice of the pendency of the action was filed, is, nevertheless, bound by that judgment, for the reason that his deed was not recorded until after the *lis pendens* was filed and recorded; in other words, that the holder of a prior unrecorded deed is to be regarded as a purchaser *pendente lite*, and therefore bound by the judgment.

This question as thus presented is *res nova* in this state, and a full discussion of it would involve an examination of several provisions of the statutes and the construction heretofore given to each.

Certainly, this contention of counsel for respondent cannot be sustained upon any reasonable construction of section 409 of the Code of Civil Procedure, which provides for filing and recording a notice of the pendency of the action in the cases there mentioned. That section provides: "From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

The mere pendency of a suit does not, as at common law, charge the subsequent purchaser. A notice of *lis pendens* must appear of record: *Head v. Fordyce*, 17 Cal. 149. This statute does not give new rights to the plaintiff, but limits rights which he had before, by requiring for the purpose of giving constructive notice, not only a suit, but the filing of a notice of it: *Richardson v. White*, 18 Cal. 102. If, therefore, the filing of the *lis pendens* is the only constructive notice which can be given of the pendency of the suit, it is clear that the operation of the *lis pendens* as constructive notice cannot be made to depend upon the fact that the deed of a prior purchaser remained unrecorded, for that would be to import into the statute a term or condition not named in it.

Several cases are cited by counsel for respondent Catlin from the reports of other states in support of their contention, and among them the case of *Hoyt v. Jones*, 31 Wis. 389, which seems to have been decided under a *lis pendens* statute essentially the same as ours. While this case supports respondent's contention, I cannot approve the conclusion reached by the court, nor the reasoning upon which it is based,—reasoning which would be much more cogent if addressed to

the question as to what the law should be. It is a significant fact, however, that after the decision of *Hoyt v. Jones*, 31 Wis. 389, the Wisconsin statute under which that case was decided was amended so as to provide in terms that a party holding an unrecorded deed should be deemed a purchaser *pendente lite*.

The other cases cited by counsel for respondent upon this point were decided under statute essentially different from ours, and upon provisions directly relating to the effect of a failure to record deeds. These cases, so far as appears necessary, will be noticed in another connection.

Respondent further contends that as against W. W. Brison (under whom respondent claims, and whose *lis pendens* was first recorded) the unrecorded deed from Mrs. Brison to appellant was void, and cites section 1217 of the Civil Code in support. This section is as follows: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." This section, counsel say, is the same as though it said: "An unrecorded instrument is invalid except as between the parties thereto," etc. If it were clear that section 1217 of the Civil Code means what counsel claims, it would not be necessary to make the paraphrase. If, however, counsel are right in their construction, *Smith v. Hodsdon*, 78 Me. 180, *Collingwood v. Brown*, 106 N. C. 362, and *Utley v. Fee*, 33 Kan. 683, cited by them, are in point; otherwise they are not. The Maine section is: "No conveyance * * * is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded," etc. In North Carolina a deed only becomes effective by filing for record. And in neither of these states is notice of the pendency of an action required to be filed or recorded, and the Kansas statute is the same as that of Maine. Our code provisions touching the recording of deeds must be construed together. At common law, recording was not necessary to the validity of the deed, or to make it effective against all subsequent conveyances; and such is the law now, except so far as our recording acts have expressly, or by necessary implication, limited their effect and operation. The object of these recording acts is to give "constructive notice of the contents thereof to subsequent purchasers and mortgagees" (Civ. Code, sec. 1213), and to declare the effect of the failure to record a prior conveyance as against a subsequent purchaser or mortgagee of the same property whose conveyance is first recorded (Civ. Code, sec. 1214); and if that section stood alone, a subsequent grantee whose deed was first recorded would have taken the title, even though he had actual notice of the

prior unrecorded deed. To prevent this, or at least to place the matter beyond question, section 1217 of the Civil Code declared that "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof." It will be seen that this section, at least as to the last clause is a necessary qualification of section 1214, and must therefore be taken in connection with it; and it should also be noticed that the only persons as to whom the failure to record a deed makes it void are subsequent purchasers and mortgagees in good faith and for a valuable consideration, while the construction contended for by counsel would make it void as to all persons (except the parties and those who had notice), including heirs and devisees, and purchasers or grantees in bad faith and without consideration.

Nor could the filing of the *lis pendens*, as contended by counsel, operate as a prior recording of a subsequent conveyance, so as to make the deed executed by the clerk to Brison relate back to the commencement of the action, as against the deed to Harlow, which was executed before the suit was begun, and recorded before the deed made by the clerk to Brison was executed; for Brison was not a subsequent purchaser within the meaning of the statute. If he acquired title either under the decree or deed, it must have been upon other grounds. Nor was the *lis pendens* such an "instrument" as the statute contemplates. The word "conveyance," as used in sections 1213 and 1214 of the Civil Code, is defined by section 1215, and the word "instrument," as used in the recording acts, was construed in *Hoag v. Howard*, 55 Cal. 564, where it was held to mean "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty," and that it did not include a writ of attachment.

It is further contended on behalf of respondent Catlin, that as Mrs. Brison held the land in trust, the beneficial estate being in her husband, that Harlow acquired no larger estate than she held, and that if he took any title under her conveyance, it was as trustee for W. W. Brison. Assuming that Mrs. Brison was a trustee for the benefit of her husband, that trust not appearing upon the deed which conveyed to her the legal title, it does not follow that her grantee did not take the property discharged of the trust: Civ. Code, secs. 856, 2243.

It is assumed and asserted by counsel for respondent Catlin, that Harlow must aver and prove that he was a purchaser in good faith and for a valuable consideration, and that unless he does so, he is a mere volunteer; and in support of this proposition section 2243 of the Civil Code is cited. That section provides: "Every one to whom property

is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration."

If the appellant were bound by the judgment against his grantor in the case of *Brison v. Brison*, the burden would be upon him to show that he "purchased in good faith and paid a valuable consideration." But appellant was not a party to that proceeding, and is not bound by the judgment. As to him, it has not been adjudged that his grantor was a trustee. That judgment is conclusive only "between the parties and their successors in interest by title subsequent to the commencement of the action." Code Civ. Proc., sec. 1908, subd. 2; *Hall v. Boyd*, 60 Cal. 443. There is therefore no ground to justify the assertion that appellant was a volunteer, or not a purchaser in good faith, unless it appears that that question was litigated and adjudicated in this case, and that does not appear. The complaint of Warnock, the tenant, recites the ground upon which appellant and respondent Catlin respectively claimed to be entitled to the rents, and in this recital disclosed that appellant claimed under a deed from Mrs. Brison, but did not disclose or allege that it was made prior to the commencement of the action of *Brison v. Brison*, and as to respondent's claim, alleged that it was under a deed from Brison, executed after the judgment in his favor. There was no allegation in the complaint that appellant purchased with notice of the trust, or that he was not a purchaser in good faith and for a valuable consideration. Respondent Catlin filed his answer first, and admitted "the several averments of fact in said complaint contained," and made no other allegations of fact. He therefore stood directly upon the judgment, and the deed made in pursuance of it, and the argument of his counsel is directed almost wholly to the proposition that appellant was bound by that judgment, notwithstanding the finding of the court that appellant's deed was made and delivered before the commencement of the action, as alleged in his answer.

As we have seen, appellant claimed under a prior deed, and that it was first recorded. The presumption was, that appellant acquired thereby the estate which his deed purported to convey, and he was in possession by his tenant.

If the deeds of the respective parties were put in evidence, without anything more, appellant's title must have prevailed, and hence the burden was upon respondent to allege and prove some fact that would qualify or invalidate appellant's title. For this purpose respondent relied upon the plaintiff's averment of the judgment, erroneously supposing that appellant was bound thereby; whilst appellant could safely

stand upon his deed, unaffected by the judgment against his grantor, until the good faith of his purchase should be attacked by averment and proof. Inasmuch as the findings expressly show that appellant's deed was acknowledged and delivered between ten and eleven o'clock, A. M., on September 15, 1886, and that the suit of Brison v. Brison was commenced and the *lis pendens* filed about four o'clock P. M., of the same day, and no fact being alleged or found which would invalidate appellants deed, or show that he held the property in trust for respondent Catlin, the judgment is not sustained by the findings. If anything were needed to confirm the correctness of this conclusion, it will be found in the conclusion of law drawn by the court from the findings of fact, viz., "that the defendant Harlow is concluded herein by said decree in the action of Brison v. Brison."

Some other questions have been made in the very able and exhaustive briefs of counsel for each party, but which, in view of the conclusion reached, it is not necessary to consider.

I advise that the judgment be reversed, and a new trial ordered, with leave to the parties to amend their pleadings, if so advised.

SHIRK v. THOMAS.

121 Indiana, 147; 16 Am. St. Rep. 381; 22 N. E. 976. (1889)

ELLIOTT, C. J. The facts pleaded by the appellants as their cause of action, shortly stated, are these: The ancestor of the appellants acquired title to the land in controversy by warranty deed from James H. Tyner, executed on the sixth day of December, 1884, and recorded on the eighteenth day of February, 1885, and James H. Tyner acquired title from Albert H. Tyner, then the owner of the land, by a warranty deed, executed on the first day of August, 1884, but not recorded until May of the following year. On the twenty-eighth day of October, 1884, William S. Thomas caused a writ of attachment to issue against Albert H. Tyner, alleging as a cause for the issuing of the writ that he was not a resident of this state. On the eighth day of January, 1885, judgment was rendered in favor of Thomas in the attachment proceedings, but neither the appellants nor their ancestor's grantor were parties to the proceedings, nor did they have any notice of them. On the seventh day of July, 1886, an order of sale was issued, and on the thirty-first day of the same month, the land was sold under the order

to Thomas. James H. Tyner paid a valuable consideration for the land, and purchased it in good faith. The appellants went into possession under their deed, and were in possession at the time of the sale.

The deed executed by Albert H. Tyner to James H. Tyner, on the first day of August, 1884, was effectual to vest title in the grantee without recording. The registry of a deed adds nothing to its effectiveness as a conveyance; all that it accomplishes is to impart notice: *Way v. Lyon*, 3 Blackf. 76 (79). The law upon this subject is thus stated in *Kirkpatrick v. Caldwell*, 32 Ind. 299: "It is only subsequent purchasers and encumbrancers in good faith, and for value who are protected against an unrecorded mortgage. As against all the world besides, the registry imparts no virtue or force whatever to the instrument. As against the mortgagor and the estate while it remains in his hands, the lien is as perfect without registry as it is with it. It is so, also, against his general creditors while he lives, and after his death."

* * *

Note: The rights of creditors holding a judgment are generally fixed by statute.

SEC. 3. SUFFICIENCY OF RECORD.

PRINGLE v. DUNN.

37 Wis. 449; 19 Am. Rep. 772. (1875)

Action to foreclose a mortgage executed by the defendant to the L. Crosse & Milwaukee Railroad Company, bearing date April 11, 1854, and recorded on that day in the office of the registry of deeds. The plaintiff claimed as a *bona fide* purchaser for value before due. The Milwaukee & St. Paul Railway was made defendant, and in its answer denied that the mortgage was, at or before the recording thereof, witnessed so as to entitle it to record, and alleged that the record showed no subscribing witnesses' names thereon, and also that the said company had since in good faith purchased a portion of the premises covered by the mortgage without any actual knowledge of the plaintiff's mortgage.

The evidence was conflicting as to whether the mortgage was duly witnessed when recorded, but it was shown that the record did not show any such attestation.

The court found that the mortgage was not witnessed until after the

record, and that the record was not constructive notice, and that the defendants were entitled to judgment, dismissing the complaint. The plaintiff appeals.

COLE, J. (After considering the evidence as to whether the mortgage was attested when left for record.) Assuming, then, that the mortgage was witnessed when it was left at the office of the register to be recorded, the further important inquiry arises as to what effect must be given to the record as constructive notice to subsequent *bona fide* purchasers for value. This record was in this State. The entry of the mortgage was made in the general index book, but the full record of the instrument had no subscribing witnesses. And therefore the question is, Would such a record operate as constructive notice to subsequent purchasers for value, independent of any actual notice? It is claimed by the counsel for the plaintiff that the record does and should so operate, notwithstanding the mistake in the registration or recording of the instrument *in extenso*. This presents a question of no little difficulty, which must be solved by the application of general principles of law to the provisions of our statute.

It is a familiar rule, that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to make the registry thereof operate as constructive notice to a subsequent purchaser. Says Mr. Justice Story: "The doctrine as to the registration of deeds being constructive notice to all subsequent purchasers, is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud." 1 Eq. Jur., 404. See also *Ely v. Wilcox*, 20 Wis. 528; *Fallass v. Pierce*, 30 id. 444; *Lessee of Heister v. Fortner*, 2 Binn. 40; *Shove v. Larsen*, 22 Wis. 142, and cases cited on p. 146. Under our statute, among other requisites, two witnesses are essential to a conveyance, to entitle it to record. The statute requires every register to keep a general index, each page of which shall be divided into eight columns, with heads to the respective columns as prescribed; and the duty is imposed upon the register to make correct entries in said index of every instrument received by him for record, under the respective and appropriate heads, and immediately to enter in the appropriate column, and in the order of time in which it was received, the day and hour of reception; and it is de-

clared that the instrument "shall be considered as recorded at the time so noted." R. S., ch. 13, 142, 143. In *Shove v. Lorsen*, *supra*, the effect of this index containing correct entries of matters required to be made therein was considered. And it was held that by force of the statute it operated as constructive notice to a subsequent purchaser. In that case the index contained an accurate description of the land mortgaged, but in transcribing the mortgage at large upon the records, a mistake was made in the description. And it was claimed in behalf of the subsequent purchaser, that it was the registration of the instrument at large which alone amounted to the constructive notice. But this construction of the statute was not adopted, the court holding that a subsequent purchaser was bound to take notice of the entries in the index, which the law required the register to make. This result seemed to follow necessarily from the language of the statute, which declared that the instrument should be considered as recorded at the time noted. Time might elapse before the instrument was transcribed at large on the record, or it might be lost and not transcribed at all, leaving the index the only record of its contents. And the manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself till it was registered in full. The further consequence would seem necessarily to result from this view of the statute, that the registration of the conveyance *in extenso* relates back to the registration in the index, and from thence there is constructive notice of the contents of the instrument. The doctrine of *Shove v. Lorsen* was approved in *Hay v. Hill*, 24 Wis. 235; but the court refused to make the entry in the index in that case operate as constructive notice, because upon its very face it bore conclusive evidence that it was not made at its date. In other words, the rectitude and integrity of the index were successfully impeached by the index itself. See also *International Life Ins. Co. v. Scales*, 27 Wis. 640. Where there is nothing upon the face of the index to impeach or throw suspicion upon its accuracy, there it would affect a subsequent purchaser with notice of those facts which the law required to appear therein. Doubtless a still further consequence follows from this construction of the statute, namely, that where by some mistake there is a discrepancy between the proper index entries and the instruments as registered, there each supplies the defects of the other in the constructive notice thereby given. That is, it appears to be the intention of the statute to charge the subsequent purchaser constructively with such knowledge as the proper index entries afford, as well as with notice of those facts derived from the registration itself. He is presumed to

have examined the whole record, and is affected with notice of what it contains. But when the instrument, as registered in full, appears defective in some material and essential parts which are not supplied by the index entries, what effect then must be given the record as constructive notice? This is really the difficult question in this case. From the entries in the index it would not appear whether the mortgage was witnessed or not. The presumption from the mere entries themselves would be, that it was witnessed and acknowledged so as to entitle it to record. But when the mortgage as registered in full was examined, it would be found that it had no witnesses and had no business on the records. As the record itself is only constructive notice of its contents, it is difficult to perceive how it can go beyond the facts appearing upon it, and charge a purchaser constructively with knowledge of a fact not in the record.

One of the counsel for the defendants states the argument on this point as follows: He insists and claims that the entries in the index book, so far as they indicated that the mortgage had been filed for record, indicated also that the mortgage was so executed as to entitle these entries of it to be made; but that when the full record was looked at for all the particulars of the mortgage, and perhaps for the express purpose of verifying the entries in the index, it is found that the apparent assertion by the index entries that the mortgage was properly executed was wholly untrue, and that the mortgage in fact was no incumbrance. The fact, as truly shown to exist by the full record, overcomes and destroys the false assertion as to the fact in the index. And it appearing by the instrument registered that it was not entitled to record, both the registration and index itself cease to affect the purchaser with constructive notice.

It is not readily perceived wherein this argument as to the effect of our various provisions upon the subject of registration is unsound. The question mainly depends upon the construction of our own statutes. So far as we are aware, this is the first time the point has been presented in this court for adjudication. We have derived but little aid from the decisions in other States, for the reason that few of them have similar statutory provisions. We have been referred by the counsel for the plaintiff to two cases in Michigan, *Brown v. McCormick*, 28 Mich. 215, and *Starkweather v. Martin*, id. 472. In *Brown v. McCormick* the effect of the registry, as notice to subsequent purchasers, was made to turn upon the curative act of 1861, mentioned in the opinion. In *Starkweather v. Martin* the question was, how far the absence, on the registry of a deed, of any mark or device indicating a seal, or of

any statement of the register that the original was sealed, affected the validity of the record entry as evidence of title? The record entry of the deed was made more than forty years before the cause was decided, by the proper officer, and in the appropriate place for the registry of deeds, under the law permitting the registry of only sealed instruments; and the instrument was in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the conveyance was sealed, and where the conclusion, attestation clause, and certificate of acknowledgment of the instrument all spoke of it as under seal. The court said that these facts and incidents taken together afforded a very strong presumption that the original was sealed.

The doctrine of this case does not seem to have a very strong bearing upon the question under consideration. It may be said that it was contrary to the duty of the register to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record, or cause to be recorded correctly, all instruments authorized by law to be recorded. 140 ch. 13, R. S. 1858. And the presumption that he performed his duty in recording the mortgage correctly, is as strong as the presumption that he would not have recorded it unless it was entitled to registry.

In *Shove v. Larsen*, a number of cases are referred to which hold that a mistake in recording a deed, or recording it out of its order, renders the registration ineffectual as notice to subsequent incumbrancers and purchasers. The doctrine of those cases would seem to be applicable to the case before us. The registration and index entries being incomplete, because showing that the mortgage had no subscribing witnesses, constructive notice could not be presumed of such a record. For the principle "that the registry is notice of the tenor and effect of the instrument recorded, only as it appears upon that record," fully applies. *Shepherd v. Barkhalter*, 13 Ga. 443. See, in addition to the cases cited in *Shove v. Larsen*, *Brown v. Kirkman*, 1 Ohio St. 116; *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, id. 472; S. C., 2 Am. Rep. 533; *Terrell v. Andrew Co.*, 44 id. 309; *Frost v. Beekman*, 1 Johns., Ch. 288. * * *

Cause remanded for further proceedings.

Note: Some courts hold that the grantee by filing the instrument

with the proper officer has done all that is necessary and that the notice is given notwithstanding mistakes in the recording of the instrument or failure to index. *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793; *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288 and note.

SEC. 4. NOTICE FROM POSSESSION.

KIRBY v. TALLMADGE.

160 U. S. 379; 40 L. Ed. 463; 16 Sup. Ct. 349. (1896)

Appeal from the Supreme Court of the District of Columbia.

This was a bill in equity filed by Maria E. Tallmadge, against the appellants to set aside and remove, as a cloud upon her title, a deed Ella A. Goudy, claiming to be heirs at law of one John L. Miller, deceased, dated August 30, 1888, and purporting to convey to the appellant Kirby the property therein described. The bill further prayed for the cancellation of a trust deed executed by the appellant Kirby and his wife to the defendants Willoughby and Williamson, and for an injunction against all the defendants except Kirby, restraining them from negotiating certain notes given by Kirby for the purchase of said lots, etc.

The facts disclosed by the testimony show that in 1882 Mrs. Tallmadge, the appellee, purchased of one Bates, for a home, lots Nos. 77 and 78, in square 239, in the city of Washington, with the improvements thereon, for the sum of \$10,000, \$5,000 of which were paid in cash, the residue to be paid in five installments of \$1,000 each. Instead of taking the title to the property in herself, she furnished the money to John L. Miller, a friend of the family, who paid the \$5,000 cash with the money thus furnished, and at her request took the title in his own name, and executed notes for the deferred payments, which he secured by a deed of trust upon the property. Subsequently, and in June, 1883, Miller also purchased with the funds of Mrs. Tallmadge the adjoining lot, No. 76, taking title in his own name, and executing a deed of trust for the deferred payments, amounting to \$1,266.

Mrs. Tallmadge took immediate possession of the premises, and has occupied them as her own from that day to the time the bill was filed; paying taxes, improvements, and interest on incumbrances, reducing

the principal \$2,266, and holding open and notorious possession under her claim of title.

Mr. Miller, who claimed no title or right to the premises in himself, on December 27, 1883, by a deed signed by himself and wife, conveyed the legal title to Mrs. Tallmadge; but this deed, through inadvertence or otherwise, was not recorded until October 4, 1888. Mr. Miller died in February, 1888, and by his will, which was dated December 1, 1880, devised his estate to his widow.

On June 16, 1888, defendants Miller, Houchens, and Goudy, collateral heirs of John L. Miller, who had made a contract with the defendants Willoughby and Williamson to give them one-quarter of whatever they could get for them out of the estate of Miller, filed a bill in the supreme court of the District against the widow and executor of Miller, the holders of the notes given by him, and the trustees in one of the deeds of trust; praying for a partition or sale of the property, the admeasurement of the widow's dower, and for a charge upon the personal estate of Miller for the unpaid purchase money of the property.

To this bill the widow of John L. Miller made answer that her husband never had any interest in the property in question; that the title was taken in his name for Mrs. Tallmadge, and that long before his death he had, by deed, duly conveyed it to her; and that neither she nor his estate had or ever had any interest in the property. In August, 1888, the pendency of this suit coming to the knowledge of Mrs. Tallmadge, she sent the original deed from Miller to her, then unrecorded, by Mr. Tallmadge, to Willoughby and Williamson, solicitors for Miller's heirs, who examined and made minutes from it.

On August 30, 1888, Houchens, Goudy, and Miller, who had filed the bill for partition, executed a deed conveying the property to the appellant Kirby, subject to the dower rights of Mrs. Miller, for a consideration of \$12,000, \$3,000 of which was said to have been paid in cash, and \$9,000 by notes secured by a mortgage or trust deed upon the property, to Willoughby and Williamson, as trustees. Kirby thereupon claimed the property as an innocent purchaser without notice of the prior deed. He at once gave notice to Mr. Tallmadge that he would demand rent for the property at the rate of \$1,000 per annum.

On receipt of this notice, Mrs. Tallmadge filed this bill to cancel and set aside the deed and deed of trust. Answers were filed by the defendants, and testimony taken by the plaintiff tending to show the facts alleged in her bill. Neither of the appellants took proof, nor did

they, or either of them, offer themselves as witnesses, but stood upon their answers.

Upon final hearing the court below, in special term, rendered a decree in accordance with the prayer of the bill, setting aside the deed and deed of trust as fraudulent and void, from which decree defendants appealed to the general term, which affirmed the decree of the court below, and further directed that Miller, on the demand of Kirby, return to him the \$3,000 which Kirby claimed to have paid, and which Miller admitted to have received.

From this decree, defendants appealed to this court.

MR. JUSTICE BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The controversy in this case arises from the fact that the deed from John L. Miller to Mrs. Tallmadge, which was given December 27, 1883, was not put upon record until October 4, 1888. In the meantime, and in February, 1888, Miller, in whose name the property had been taken for the benefit of Mrs. Tallmadge, died; and on August 30, 1888, Houchens, Goudy, and Richard Henry Miller, collateral heirs of John L. Miller, executed a deed of the property, subject to the dower rights of Miller's widow, to defendant Kirby, for an expressed consideration of \$12,000, of which \$3,000 are said to have been paid down in cash, and \$9,000 in notes payable to Willoughby and Williamson. Kirby now claims to be an innocent purchaser of the property, without notice of the prior deed from John L. Miller to Mrs. Tallmadge.

There are several circumstances in this case which tend to arouse a suspicion that Kirby's purchase of the property was not made in good faith. Within three months after the probate of the will of John L. Miller, his collateral heirs, Houchens, Goudy, and Richard H. Miller, who had made a contract with Willoughby and Williamson to give them one-quarter of whatever they could get for them out of the estate of Miller, filed a bill for the partition of real estate, and to set off the widow's dower. His widow, Lola, answered, admitted that her husband did not purchase the lands described in the bill, and alleged that he had conveyed them away in his lifetime. * * *

But the decisive answer to the case of *bona fide* purchase made by the defendant Kirby is that Mrs. Tallmadge had, ever since the original purchase of the land by Miller, in 1882, been in the open, notorious, and continued possession of the property, occupying it as a home. The law is perfectly well settled, both in England and in this country,—except, perhaps, in some of the New England states,—that such possession under apparent claim of ownership is notice to purchasers of

whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry. 2 Pom. Eq. Jur. 614; Wade, Notice, 273. The same principle was adopted by this court in *Landes v. Brandt*, 10 How. 348, 375, in which it was held that "open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that the purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under, and that he (the subsequent purchaser) was bound by that title, aside from all other evidence of such possession and holding." The principle has been steadily adhered to in subsequent decisions. *Lea v. Copper Co.*, 21 How. 493, 498; *Huges v. U. S.*, 4 Wall. 232, 236; *Noyes v. Hall*, 97 U. S. 34; *McLean v. Clapp*, 141 U. S. 429, 436, 12 Sup. Ct. 29; *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239.

Defendants' reply to this proposition is that the occupancy in this case being that of a husband and wife, is by law referable to the husband alone, as the head of the family; that the purchaser was not bound by any notice, except such as arose from the possession of the husband; and that, as he had no title to the property, Kirby was not bound to ascertain whether other members of the family had title or not. There are undoubtedly cases holding that occupation by some other person than the one holding the unrecorded deed is no notice of title in such third person, and that the apparent possession of premises by the head of a family is no notice of a title in a mere boarder, lodger, or subordinate member of such family, or of a secret agreement between the head of a family and another person. As was said by this court in *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357: "Where possession is relied upon as giving constructive notice, it must be open and unambiguous, and not liable to be misunderstood or misconstrued. It must be sufficiently distinct and unequivocal, so as to put the purchaser on his guard." In this case one James Townsend bought and took possession of a public house in Salt Lake City, and lived in it with his lawful wife and a plural or polygamous wife; the latter who was the appellant, taking an active part in conducting the business of the hotel. He subsequently ceased to maintain relations with the appellant, as his polygamous wife; but, being desirous of having the benefit of her services, both concealed this fact. He made a secret agreement with her that if she would thus remain she should have a half interest in the property. He afterwards acquired his legal title to the property, with-

out a disclosure of the secret agreement. His interest therein having subsequently passed into the hands of innocent third parties for value, without notice of appellant's claim under the secret agreement, it was held that the joint occupation of the premises by herself and Townsend, under the circumstances, was not a constructive notice of her claim, and that she had no rights in the premises, as against a *bona fide* purchaser without notice. There were evidently two substantial reasons why appellant's possession was not notice of her rights: First, James Townsend took the legal title to himself in 1873, and held it until 1878, when the purchase was made; and, second, his agreement with the appellant was not one with his lawful, but his polygamous, wife, and was also a secret one. The case is obviously not one of a joint occupation by a husband and his lawful wife, neither of them having any title thereto.

In the case of *Thomas v. Kennedy*, 24 Iowa, 397, it was held that, where real estate is ostensibly as much in the possession of the husband as the wife, there is no such actual possession by the wife as will impart notice of an equitable interest possessed by her in the land, to a purchaser at execution sale under a judgment against her husband, in whom the legal title apparently was at the time of the rendition of the judgment. This case is also a mere application of the rule that, if there be any title to the land in one who is in possession of it, the possession will be referred to that title, or, as said in 2 Pom. Eq. Jur. 616, "Where a title under which the occupant holds has been put upon record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, but has had no actual notice beyond what is thereby disclosed." That the court did not intend to hold that a joint occupation by a husband and wife is in no case notice of more than the occupation of the husband, is evident from the subsequent case of *Trust Co. v. King*, 58 Iowa, 598, 12 N. W. 595, in which the court said, "It cannot, we think, be doubted that possession of real property by a husband and wife together will impart notice of the wife's equities, as against all persons other than those claiming under the husband, their possession being regarded as joint by reason of the family relation." In this case the occupation was by a husband and wife, and it was held that such possession was notice of a title in the wife to a life estate in the property, as against the holder of a mortgage given by a son, who was a member of the family as a boarder; lodging a part of the time in his mother's house, and a part of the time elsewhere,—the legal title being in the son.

In the case of *Lindley v. Martindale*, 78 Iowa, 379, 43 N. W. 233, the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion. The lands had for a long time been cared for either by the husband or the son, and it was held that one who, upon being told that the title was in the son, took a mortgage from him to secure a loan, which was used for the most part to pay off prior incumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land, the court holding that her possession was not such as the law requires to impart notice. The case is not entirely reconcilable with the last.

In *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182, a widow furnished her bachelor brother money with which to buy a farm for their joint use; the title to be taken to each in proportion to the sums advanced by them, respectively. He, however, took a conveyance of the entire estate to himself, and they both moved upon the place; he managing the land, and she attending to the household duties. The deed was recorded, and he borrowed money, mortgaged the land to secure the loan, and appeared to the world as the owner for a period of over 10 years, during which time the sister took no steps to have her equitable rights enforced or asserted. It was held that her possession, under such circumstances, was not such as would charge a subsequent purchaser from her brother with notice of her equitable rights. Here, too, the record title was strictly consistent with the possession.

In *Rankin v. Coar*, 46 N. J. Eq. 566, 22 Atl. 177, a widow, who occupied part of a house in which she was entitled to dower, while her son, the sole heir at law, occupied the rest of the house, released her dower therein to her son by deed duly recorded. It was held that her continued occupation thereafter would not give notice to one who took a mortgage from the son, of a title in her to a part of the house occupied by her, acquired by an unrecorded deed to her from her son contemporaneous with her release of dower. "Possession," said the court, "to give notice, or to make inquiry a duty, must be open, notorious, and unequivocal. There must be such an occupation of the premises as a man of ordinary prudence, treating for the acquisition of some interest therein, would observe, and, observing, would perceive to be inconsistent with the right of him with whom he was treating, and so be led to inquiry."

So, in *Atwood v. Bearss*, 47 Mich. 72, 10 N. W. 112, the title to property, upon the record, appeared to be in the wife. Her husband's previous occupation had been under her ownership, and in right of the

marital relation, and nothing had transpired to suggest that she had made the property over to him. She had, however, given him a deed, which was not put upon record. It was held that his continuance in possession was no notice of this deed, since it was obviously consistent with the previous title in herself.

Indeed, there can be no doubt whatever of the proposition that where the land is occupied by two persons, as for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. In such case the purchaser, finding title in one, would be thrown off his guard with respect to the title of the other. The rule is universal that, if the possession be consistent with the record title, it is no notice of an unrecorded title. But where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, we think that, in view of the frequency with which homestead property is taken in the name of the wife, the proposed purchaser is bound to make some inquiry as to their title.

The case of *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109, is an instance of this. In this case a suit was brought to foreclose a mortgage upon certain premises, given by one Murphy, who held an apparently perfect record title to the property. It appeared, however, that, before the execution of the mortgage, Murphy had conveyed the premises to one Margaret Brady, who was in possession, and, with her husband, occupied two rooms in the building on the premises. She also kept a liquor store in a part thereof. The other rooms she leased to various tenants; claiming to be the owner, and collecting the rents. Her deed was not recorded until after the giving of the mortgage. It was held that her actual possession under her deed, although unrecorded, and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. This case goes much further than is necessary to justify the court in holding that Mrs. Tallmadge's possession was notice in the case under consideration, as the actual occupation of the wife was only of 2 rooms in a tenement house containing 43 apartments.

If there be any force at all in the general rule that the possession of another than the grantor puts the purchaser upon inquiry as to the nature of such possession, it applies with peculiar cogency to a case like the present, where the slightest inquiry, either of the husband or wife, would have revealed the actual facts. Instead of making such inquiry, Kirby turns his back upon every source of information, does not even enter the house, makes no examination as to whether the property was

in litigation, and buys it of collateral heirs of Miller, subject to his widow's dower if he had had the title, to an unpaid mortgage, and to the chances of the property being required for the payment of Miller's debts. It is clear that a purchase made under such circumstances does not clothe the vendee with the rights of a *bona fide* purchaser without notice.

We see no reason for impeaching the original purchase of the land by Mrs. Tallmadge. Her account of the transaction is supported by the testimony of all the witnesses, as well as by the receipts and other documentary evidence. Her failure to cause the deed to be recorded is not an unusual piece of carelessness, nor is it an infrequent cause of litigation. Under the circumstances of the case, it raises no presumption of fraud. What motives she may have had for taking the title to the property in the name of Mr. Miller is entirely immaterial to the present controversy, although it appears from her testimony that she was possessed of money in her own right, and took this method of investing it.

The decree of the court below is therefore affirmed.

SIMMONS CREEK COAL CO v. DORAN.

142 U. S. 417; 35 L. Ed. 1063; 12 Sup. Ct. 239. (1892)

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

* * * Again, actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice. 2 White & T. Lead. Cas. 180; Landes v. Brant, 10 How. 348; McLean v. Clapp, 141 U. S. 429, 436, 12 Sup. Ct. Rep. 29; French v. Loyal Co., 5 Leigh, 641; Western M. & M. Co. v. Peytona Cannel Coal Co., 7 W. Va. 406, 441; Core v. Faupel, 24 W. Va. 238; Morrison v. Kelly, 22 Ill. 610. "Possession," said Walker, J., in the case last cited, "may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which, in contemplation of law, draws to and connects it with the possession. But to be adverse it must be a *pedis possessio*, or an

actual possession." In *Ewing v. Burnet*, 11 Pet. 53, it was held that neither actual occupancy nor cultivation nor residence was necessary to constitute actual possession that where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim, such possession will create a bar under the statute of limitations; that what acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality, and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. And so possession of an improved portion of a tract of land, under a conveyance in fee of the whole, is construed to be co-extensive with the grant. And where a party purchases land adjoining a tract of which he is already in the occupancy, he will be considered as at once, in point of law, in the possession of the newly-acquired tract, when the latter is vacant, or at least not held under an adverse possession.

Now, W. H. Witten, resided on 400 acres of land which adjoined the 1,100 acre tract, while the 200 acres bounded on the 1,100 acres, and neither of the latter tracts was in adverse possession when purchased by Witten; and the evidence of W. Scott Witten shows that W. H. Witten used the 200-acre tract as a range for his cattle, and paid the taxes on it, and that, after W. Scott Witten purchased it at the judicial sale he also used it in the same way. In other words, such possession as the land was susceptible of was taken and maintained, and, in addition to that, it connected with the home tract on which W. H. Witten had lived for 50 years. The possession, such as it was, was notorious, and contributes its weight to the other proofs of notice.

We repeat that we regard it as satisfactorily established that the defendants had such notice as put them on inquiry, and charged them with knowledge of the facts, and, under the circumstances, their silence is most significant. * * *

TATE v. PENSACOLA GULF ETC. CO.

37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542. (1896)

LIDDON, J. * * * It is claimed by the complainant that the actual possession and occupancy of the premises by his predecessors is, of itself, sufficient to charge the defendant with notice of his equitable title. The Pensacola, Gulf, Land and Development Company admits in its answer a knowledge that the occupation and use of the hospital, and grounds inclosed about the same, was held by the Hargises, but was informed and understood that such holding was by consent of Emma I. Petterson and subject to her title. It denies all knowledge or notice of the possession or occupation of the remaining portion of the tract involved in the litigation. The case of *McRae v. McMinn*, 17 Fla. 876, was in some of its features like the present. There the vendee knew that another was in possession of the land, but believed she was in possession as a tenant, holding under another. This knowledge, coupled with the fact that the instrument which purported to pass title to his grantor, but which was ineffectual to pass such title, was of record, and contained a description of the topography of the land, was held to be sufficient to lead the vendee to inquiry by which he might have learned the nature of the title and claim of the party in possession, and that a court of equity would deem him connusant of it.

In this case, the rule was laid down that a subsequent purchaser, although without actual notice, will be considered a purchaser of the seller's title subject to the equities of the tenant. It may be conceded that the facts of the case hardly required so broad an enunciation of the rule, as there was some actual notice of the possession. Therefore the court said: "The authorities go beyond the case at bar. We think the general rule is, that where a person, other than the grantor, is in possession, it is the purchaser's duty to inquire into the title; and the presumption of law is, that upon such inquiry he ascertains the true state of the title." The broad general rule has often been proclaimed by the courts that, "the actual possession of land is notice to all the world of whatever rights the occupant really has in the premises, and a vendor cannot convey to any other person without such person being affected with such notice": *Finch v. Beal*, 68 Ga. 594; *Sewell v. Holland*, 61 Ga. 608. In such cases open, visible, actual possession is of itself notice of the rights of those in possession. Actual knowledge of such possession on the part of those sought to be charged with such notice is not necessary. Notice in such cases is a legal de-

duction from the fact of possession: *Allen v. Caldwell*, 55 Mich. 8; *Woodward v. Clark*, 15 Mich. 104; *Hamilton v. Fowlkes*, 16 Ark. 340, and many authorities cited in text. * * *

BILLINGTON'S LESSEE v. WELSH.

5 Binney, 129; 6 Am. Dec. 406. (1812)

TILGHMAN, C. J. The plaintiff was a purchaser at the sheriff's sale, by virtue of an execution levied on a tract of land belonging to Daniel Turner. The defendant claims under Turner by a parol agreement accompanied with possession. Although our act of assembly requires all contracts concerning land to be reduced to writing, yet under the decisions which have been made, there can be no doubt but that where the contract has been executed and carried into effect by payment of a valuable consideration and delivery of possession, the contract is binding between the parties. But where a third person is to be affected the case is more difficult. In order to bind him, something must be shown which makes it inequitable to break the parol contract. The defendant undertakes to show that the plaintiff purchased with notice of the contract; and if so, it would certainly be against equity that he should recover in this suit. But it behooves a person who stands on a defense of this kind, to make out a clear case.

No actual notice has been proved; but it is contended that the possession of the defendant was notice in law. These legal notices, being sometimes contrary to the fact, are confined to cases in which violent presumption of actual notice arises. The undisturbed possession of land has generally been considered as legal notice, because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possessor. But to entitle the bare possession to such weight it ought to be a clear, unequivocal possession.

Let us examine what kind of possession has been proved in the present case. The defendant is the brother-in-law of Daniel Turner, and lived at the time of the sheriff's sale, and for a considerable time before, on one corner of Turner's tract. Turner had erected a forge, grist-mill and saw-mill, with all those small buildings which are connected with works of that kind. It is well known that in such cases the workmen frequently occupy houses with small portions of land an-

nexed to them. And when a person throws his eye over a forge and mills, and the adjacent buildings and inclosures, it naturally occurs to him that they all belong to the proprietor of the works. The defendant has been guilty of extraordinary negligence; for not only has he omitted to survey and mark the bounds of his claim, but he has given no decided evidence of boundary. His contract was to have fifty acres of land somewhere about his house; but whether he was to cross the stream and include the land on both sides, so as to have the command of the water, was not proved. Now this is a most important circumstance. For if he has the command of the water, which it is said he claims, he may exercise it in such a manner as to do material injury to the iron-works erected by Turner. The defendant's claim is principally woodland, consequently the knowledge of his possession is so much the more difficult.

Under all these circumstances it would be going too far to say that such a possession is notice to all the world. How could any man reasonably suppose that Turner's brother-in-law, occupying a small parcel of land at no great distance from the ironworks, had good title, not only to the land on which his house and fences stood, but also to the water, to such a degree as to deprive Turner of the right of using the stream to the full extent that his works might require? There is another circumstance unfavorable to the defendant. Connected as he was with Turner, it can hardly be imagined that he was ignorant of the judgment against him, and it became his duty to make known to the world this secret title to part of the land which passed for Turner's. It does not appear that he made any publication on this subject. Not having done so, it seems to me that he acted at his peril, and that he has no right, to complain if his title is impeached by persons who had no actual notice of it. Perhaps in another ejectment he may make a stronger case. But, on the evidence produced at this trial, I think the judge was right in advising the jury to find for the plaintiff. I am, therefore, against granting a new trial.

YEATES, J. (after stating the case): It was admitted that Welsh gave no notice of his equitable title to the sheriff at the time of the levy or at either of the sales; though it was proved by four witnesses that the sales intended to be had were known in the neighborhood of the land. I thought it reasonable to presume, and so instructed the jury, that the defendant Welsh knew of what was going forward, and that he ought to have given notice of his claim to the sheriff and warned all persons against purchasing, if he really knew of the intended sales. Failing herein, a legal fraud would be imputed to him.

This presumption was founded on the notoriety of the premises being taken in execution, and of the intended sales under the sheriff's advertisements; on the delay to sell till above two years after both judgments; on one sale being set aside; and on the defendant's living on good terms with his brother-in-law on the same tract of land, and who could not therefore be supposed ignorant of his embarrassments.

But it was strenuously contended on the part of the defendant, that his actual possession of the lands, and carrying on a distillery, was constructive notice to a purchaser at the sheriff's sale, and that he was bound to examine into that fact before he bought. No law cases were produced on this point, and my mind was unsettled on the subject. I well recollected that a trustee in possession of the estate, conveying for a valuable consideration without notice, the purchaser would have the estate against the *cestui que trust*; but not so if the latter was in possession at the time: 2 Fonb. 170; 2 Bl. Com. 337. But how far the law obtained as to constructive notices in general cases, or whether it would extend to a case circumstanced like the present, I was not prepared to assert. I therefore advised that the point should be reserved for further consideration. This the plaintiff's counsel acquiesced in, but the defendant's counsel refused to agree thereto. The jury found a verdict for the plaintiff, subject to the court's opinion on the question of law, considered as a reserved point; and it was agreed by mutual consent, that the argument should be carried into *banc*, to be there proceeded in, as fully as it might be done in the circuit court on the notes of the trial. I have had sufficient time to consider the question, which is merely of a legal nature, whether upon the facts disclosed on the trial, there was implied notice to the sheriff's vendee of the defendant's equitable title.

Constructive notice is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. If a man confesses notice that the estate at law was in a third person at the time when he purchased, he is bound to take notice of what the trust is: 2 Freem. 137, pl. 171. It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had which was a surprise upon him: 2 Ves. Jun. 440. It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted, that he could not transfer the ownership and possession at the same time, that there were interests as to

the extents and terms of which it was his duty to inquire. But notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title: Sugd. Law of Vend. 499. And a purchaser *bona fide* and without notice cannot be affected by the mere circumstance of the vendor being out of possession for many years.

Thus in *Axwith v. Plummer*, 3 Bac. Ab. 644, first ed. Mortgage E., s. 3, where A. covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made, and A. thirteen years afterwards surrendered the same lands to B. for valuable consideration, without notice of the covenant, B. was held to be entitled to the lands, and the covenantees were left to their remedy at law. This authority, which is marked with approbation by Sugden in the page already cited, goes the full length of deciding the present question. It is of peculiar importance that notice should be given at sheriff's sales of adverse claims; and the observation of Lord Commissioner Rawlinson, 2 Vern. 159, that "equity has always been careful not to impeach purchasers by presumptive notice," holds with appropriate force, where lands have been sold by process of law. The interests of debtors, creditors and purchasers are all involved in the principle. Here no notice whatever was given of the defendant's claim. The advertisement was of three hundred acres, more or less, in Patton township, with a forge, grist and saw-mill thereon, and the lands were so conveyed by the sheriff. A tract of two hundred and thirty-four acres, twenty-seven perches, was surveyed to Turner under his warrant for two hundred acres, on which he dwelt and made valuable improvements; and it is now sought to reduce the quantity sold to one hundred and thirty-four acres twenty-seven perches, and to affect the right of the purchaser as to the water of Spring creek, which is indispensably necessary to the carrying on of his manufactories. At best the possession of the defendant was of a mixed nature. His pretensions were not defined by marked boundaries or an actual survey. If one inclining to purchase had previously viewed the premises, he would have seen nothing but what usually occurs, where forges, grist and saw-mills are carried on, out-houses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner as an exclusive, unmixed possession in common cases might reasonably seem to give. In every view which I have been able to take of the case I am of opinion that judgment should be rendered for the plaintiff on the verdict.

CHAPTER XXXII.

RESTRICTIONS ON TRANSFER.

Section 1. Fraudulent Conveyances.

Section 2. Homestead Exemptions.

Section 3. Spendthrift Trusts.

SEC. 1. FRAUDULENT CONVEYANCES.

PARISH et al. v. MURPHREE et al.

13 How. (U. S.) 92; 14 L. Ed. 65. (1851)

MR. JUSTICE McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the District Court of Northern Alabama.

The bill was filed to set aside a deed of settlement, made by George Goffe, dated the 12th September, 1837, on his wife and four daughters, on the ground, that it was made in fraud of creditors.

At the date above stated, Goffe and wife, by deed of general warranty, conveyed to Thomas Williams, Jr., six hundred and forty acres of land, including the "Blount Spring Tract," in Blount County, State of Alabama, for the consideration of sixty-four thousand dollars.

To secure the payment of the consideration, on the same day, Williams executed a deed of trust on the same property to Joseph M. Goffe and George Goffe, for which notes bearing interest were given, five thousand dollars payable 1st March, 1838, five thousand payable on the 1st of October following, ten thousand the 1st of October, 1840, ten thousand the 1st of October, 1842, ten thousand the 1st of October, 1844, ten thousand the 1st of October, 1846, and fourteen thousand the 1st of October, 1848. Williams was to remain in possession of the land, and was authorized to sell parts of it to meet the above payments.

On the same day, George Goffe executed a deed of settlement signed also by Joseph M. Goffe, by which he appropriated to his four daughters, the four ten thousand dollars notes above stated, and the fourteen thousand dollars note to his wife in consideration of "the natural love and affection he had for them."

The complainants represent that George and J. M. Goffe did business together as merchants, and that on the 2d of February, 1837, they executed to them, their promissory note for \$5,169 payable in thirteen months; and on the same day another note payable in twelve months for five thousand one hundred and sixty-eight dollars and twenty-five cents; also another note on the 22d September, 1837, for \$953.25, payable nine months after date. On all which notes judgments were obtained in the District Court, amounting to the sum of \$14,667.42, at November term, 1841. Executions having been issued on the judgments, were returned no property, and the defendants are alleged to be insolvent. And the complainants pray that George Goffe may be decreed to pay the amount due them, and on failure to do so, that Williams may be decreed to pay the same, and in default thereof, that the lands and real estate or debts assigned to Mrs. Goffe and her children, may be converted into money by sale or otherwise so as to pay the sum due the complainants.

The defendants deny the allegations of the bill, and aver that at the time of the settlement the Goffes were able to pay their debts; that their assets exceeded their liabilities, and that the complainants have failed to collect their claims through their own negligence.

The statute of frauds of Alabama declares that "every gift, grant, or conveyance of lands, &c., or of goods or chattels, &c., by writing or otherwise, had, made, or contrived, of malice, fraud, covin, collusion, or guile, to the end or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, &c., shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, &c., whose debts, suits, &c., by such means, shall or might be, in anywise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void," &c.

This statute appears to have been copied from the English statute of the 13th Elizabeth, and most of the statutes of the States, on the same subject, embrace substantially the same provisions. The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual being in debt shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future respon-

sibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which if known to the public would not affect his credit, is fraudulent, would be a perversion of the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void.

In the case before us, two of the debts, exceeding ten thousand dollars, were contracted in February, 1837, seven months before the settlement deed was executed. The other debt of nine hundred and fifty-three dollars and twenty-five cents, was contracted the 22d of September, ten days after the settlement. The property conveyed amounted to sixty-four thousand dollars, fifty-four thousand of which were covered by the settlement.

This conveyance is attempted to be sustained on the ground that Mrs. Goffe relinquished her dower to the tract conveyed, and that George Goffe, including the partnership concerns, held an aggregate property, after the settlement, amounting to the sum of sixty-five thousand dollars; and that the debts against Goffe individually and also against the partnership, did not exceed twenty-five thousand dollars. It appears that in the Fall of 1837, and in the early part of 1838, a large amount of his paper being due at New York, including the plaintiffs' was not paid. Suits were commenced against him, and early in 1839, his property, within the reach of process, was all sold. Goffe, it is proved, sent to Texas in 1839, by his brother, ten negroes and other property, worth about ten thousand dollars. In 1840. George Goffe went to Texas, where he afterwards died. Twenty-seven judgments were rendered against him, four of which were on notes dated the 27th of February, 1837, and four on notes given in September and October following, independent of the plaintiffs' judgments.

These facts are incompatible with the assumption, that Goffe's assets were more than double his liabilities. His aggregate of property

must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement, and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his means fifty-four thousand dollars, this enlargement of his business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove, that after the voluntary conveyance Goffe was unable to meet his engagements. Nothing can be more deceptive, than to show a state of solvency by an exhibit on paper of unsalable property, when the debts are payable in cash. Such property when sold will not, generally, bring one-fifth of its estimated value. And such seems to have been the result in the case before us.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that when the settlement was made, Goffe was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly over-estimated. On such a basis, no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made the settlement.

A conveyance under such circumstances, we think, would be void against creditors, at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it. *Sexton v. Wheaton ex us.* 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat, 199; *Hutchinson et al. v. Kelley*, Robinson's Rep. 123; *Miller v. Thompson*, 3 Porter's Rep. 196.

RUDY v. AUSTIN.

56 Ala. 73; 35 Am. St. Rep. 85; 19 S. W. 111. (1892)

• Action by John M. Rudy to quiet title to real property conveyed to him while a minor, and sold by his father, acting as his guardian. The plaintiff claimed that this sale was made under an agreement between the father, as guardian, and Lynch, Neal, and Austin, his creditors, whereby they agreed to purchase the property at a guardian's sale to be thereafter made, and the guardian to accept payment in the indebtedness owing by him to such creditors. By way of cross-complaint the defendants alleged that the father, being insolvent, purchased the property in controversy and caused it to be conveyed to his son, then only six years of age; that the father remained insolvent until his death; that the conveyance to the son was made for the purpose of defrauding the father's creditors; that the father was engaged in business, and to pay his indebtedness finally entered into the agreement relied upon by the plaintiff and under which the property thus conveyed to plaintiff was to be sold and the proceeds thereof to be applied to the payment of the father's debts. The conveyance to the son was made in 1870, and the guardian's sale in 1879. Judgment in favor of the defendants on their cross-bill.

BATTLE, J. The conveyance of the lots in controversy by Divilbliss and wife to the appellant was virtually a conveyance by George H. Rudy to his son, John M. Rudy, the same having been purchased and paid for by the father. It was a voluntary conveyance. Was it void as to the creditors of Rudy?

A debtor has the right to make reasonable provisions in property for his wife or children according to his state and condition in life. But in doing so he must retain in his possession property amply sufficient to pay all his debts. If he does so fairly and honestly, the child or wife for whom the provision was made is not bound to refund the advancement, for the benefit of creditors, in the event the parent or husband should subsequently fail or become unable to pay the debts he owed when the provision was made: *Bertrand v. Elder*, 23 Ark. 494.

The law requires every man to be just before he is generous. If he makes a voluntary conveyance while he is in debt, it presumes that it is fraudulent as to existing creditors, and the burden is on those claiming under the conveyance to repel the presumption. If he be insolvent, unable to pay his debts, the presumption that it is fraudulent as to antecedent creditors is conclusive. The rule is correctly stated

in Driggs etc. Bank v. Norwood, 50 Ark. 46, 7 Am. St. Rep. 78, as follows: "Every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But as to subsequent creditors, a voluntary conveyance by a person in debt is not *per se* fraudulent. To make it so, proof of actual or intentional fraud is required."

According to the uncontroverted allegations of the cross-complaint George H. Rudy was unquestionably insolvent; and the conveyance to his son was void as to existing creditors. Was it void as to subsequent creditors?

Against subsequent creditors a voluntary conveyance executed by a grantor in debt at the time is not void, unless actually fraudulent. To make it fraudulent proof of actual or intentional fraud is required. As to what will be sufficient proof of such fraud the authorities are obscure and conflicting.

In order for a subsequent creditor to avoid a voluntary conveyance it is not sufficient to show that there are "debts still outstanding, which the grantor owed at the time he made it," as held in Toney v. McGehee, 38 Ark. 427. Mere indebtedness is no evidence of fraud as to such creditors. But the insolvency of the grantor at the time of the conveyance is at least *prima facie* evidence of a fraudulent intent as to them, "because a transfer of property under such circumstances affords a reasonable ground of presumption that the intention with which it was made was to put beyond the reach of creditors, future as well as present, the property to which they had a right to resort for the payment of their debts." This presumption would necessarily arise if the grantor contracted debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made. From his inability to pay and the voluntary alienation, the conclusion would naturally follow that he did not intend to pay such debts when they were contracted, and that the conveyance of the property was intended to delay or prevent the collection thereof by the sale of the property under due process of law: Winchester v. Charter, 12 Allen, 606; Winchester v. Charter, 97 Mass. 140; Morrill v. Kilner, 113 Ill. 318, 322; Moritz v. Hoffman, 35 Ill. 553; Taylor v. Coenen, L. R. 1 Ch. Div. 636, 641; Reade v. Livingston, 3 Johns. Ch. 501, 502; 8 Am. Dec. 520; Redfield v. Buck, 35 Conn. 328, 337; 95 Am. Dec. 241; Ridgeway v. Underwood, 4 Wash. C. C. 137; Howe v. Ward, 4 Greenl. 195, 206; Sexton v. Wheaton, 8 Wheat. 229, 252; Horn v. Volcano Water Co., 13 Cal. 71, 72; 73 Am. Dec.

569; Bump on Fraudulent Conveyances, 3d ed., 322; 2 Bigelow on Frauds, 99, 181, 200; May on Fraudulent Conveyances, sec. 973.

This case is a fair illustration of the rule. At the time of the execution of the conveyance in question George H. Rudy was insolvent; his liabilities far exceeded his ability to pay. His vocation was farming. He had been engaged in that business for many years previous to the execution of the deed by Divilbliss and wife, and continued to farm many years thereafter. He had no other occupation, so far as is shown by the evidence. In following his vocation he purchased extensively goods, wares, merchandise, and supplies needed to support his family and in his farming operations, on a credit, from merchants in Van Buren. He made large crops, and, when gathered, delivered them to the merchants to whom he was indebted, to be appropriated to the payment of his accounts. His crops would fall far short of paying his debts, and the result was he continued to farm and contract debts and pay them in this manner every year, so far as the proof shows, using the crops of one year to pay the debts contracted in the preceding year and the current year, so far as they would extend, and was always in debt with his merchants. In this way he did business with Lynch prior to and at the time of the execution of the deed to appellant, and was in debt to him when the lots in controversy were conveyed to his son. In this way he continued to do business with him until he became a partner of Neal. In 1871, a short time after the execution of the deed in question, he commenced buying of Neal, and in this way purchased from him and delivered crops on account until 1874, when he and Lynch became partners, and in this way did business with them until 1881; and in this way commenced business with Austin in 1876, and did business with him in the years 1876 and 1877. His habits and necessities of business were such as to plainly show that he, at the time he caused the lots to be conveyed to his son, necessarily had in view and knew that he would contract debts in the manner he did, and that his intention in procuring the execution of the deed to his son was to put beyond the reach of his creditors, antecedent and subsequent, the lots in controversy, and to deprive them of the right to appropriate them by due process of law to the payment of his indebtedness. He could not reasonably have had any other motive. His son was about six years old, and there was no occasion for making any such provision at that time. All these facts go to prove the uncontroverted allegation of the cross-complaint that he caused the deed to be made to the appellant in order to defraud his existing creditors, "and

in anticipation of and reference to his subsequent indebtedness and insolvency"—to defraud his subsequent creditors. * * *

Note: See note upon this case, 35 Am. St. Rep. 90.

HAGERMAN v. BUCHANAN.

45 N. J. Eq. 292; 14 Am. St. Rep. 732; 17 Atl. 946. (1889)

REED, J. The complainants below furnished lumber to J. H. Hagerman and Son between the dates of July 24, 1886, and November 29, 1886. On March 4, 1887, a judgment was recovered in the supreme court for the sum of \$958.53, the price of said lumber. Under a *feri facias* issued thereon, a certain house and lot in Asbury Park was levied upon. The title to this property stood in the name of Sarah Hagerman, the wife of the defendant John H. Hagerman. It was conveyed to her by her husband, through an intermediate person, on July 17, 1883. The bill in this case was filed by Buchanan & Co., the judgment creditors, for the purpose of having the conveyance made by Hagerman to his wife declared void, upon the ground that it was made to hinder and delay creditors, and to have the property sold, and the proceeds applied to the payment of their judgment. The court below advised that the case stood in the same posture as that of *Demarest v. Terhune*, 18 N. J. Eq. 532, and that the rule adopted in that case was properly applicable to this. A decree was accordingly made that the deed made by Hagerman to his wife should be regarded only as a security for the consideration actually paid by her.

It is perceived that the debt of the complainant was contracted over three years after the conveyance was made which is attacked. If the conveyance is to be regarded as in a degree voluntary, the creditor has a burden imposed upon him which would not exist had his debt antedated the deed. The character of a voluntary conveyance, when attacked by a creditor having a pre-existing claim, is definitely settled in this court. In the case of *Haston v. Castner*, 31 N. J. Eq. 697, after an elaborate review of the course of judicial sentiment in this state, it was decided that, in respect to debts existing at the date of a voluntary conveyance, the deed was void by force of the statute relating to frauds and perjuries. Against the attack of a creditor belonging to this class, neither the motive which induced the deed, nor the solvency of the

grantor at the time of its execution, nor any other circumstances which might bear upon the *bona fides* of the parties to the conveyance, is important. Fraud is the legal conclusion arising from the contemporaneous concurrence of the two facts, namely, a voluntary deed and an existing debt due by the grantor.

In respect to the attitude which subsequent creditors bear towards a voluntary conveyance, there has not been, so far as I recall, a deliverance by this court. But the sentiment, both judicial and professional, is hardly less doubtful upon this than upon the former question. The rule which has been recognized is, that a voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the mind of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means of the deed. In the case of *Ridgway v. Underwood*, 4 Wash. C. C. 129, Judge Washington, after stating that he had examined the numerous cases which related to the operation of the statute (13 Elizabeth), remarked that, with entire satisfaction to himself, he had reached the following result: "A voluntary deed by a person indebted at the time to any amount is fraudulent and void as to such prior creditors, merely upon the ground that he was so indebted. But as to subsequent creditors, the deed is not void for that reason, because it does not necessarily or even rationally follow that the conveyance was fraudulently made with intent to hinder or delay creditors who became such long after the deed was made. But if the case presents other circumstances from which fraud can legally be inferred, the voluntary conveyance will be avoided in favor of a subsequent creditor." This case was cited with approval by Chancellor Green in his opinion in the case of *Beeckman v. Montgomery*, 14 N. J. Eq. 106.

In the case of *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520, Chancellor Kent, after an elaborate view of the authorities, came to the conclusion, also, that, in respect to pre-existing creditors, a voluntary conveyance was fraudulent as a legal inference, and ought to be so far as it concerned existing debts, but that as to subsequent debts there was no such necessary legal presumption, and there must be proof of fraud in fact. Indebtedness existing at the time, although not amounting to insolvency, must be such as to warrant that conclusion. The view of the learned chancellor was, that while fraud would be imputed to the voluntary grantor, so far as the grant affected pre-existing debts, yet that the fact of the existence of such debts, and their relative amount in comparison with the property of the grantor remaining were as to debts subsequently arising, only facts which were

important in determining whether there was an actual intent, at the time of the conveyance, to hinder and delay creditors. The doctrine of this case, so far as it dealt with the attitude of a voluntary grantor toward prior creditors, was adopted by this court in the case of *Haston v. Castner*, 31 N. J. Eq. 697.

The opinion in the former case was also noticed in the opinion in *Haston v. Castner*, *supra*, as one delivered by a distinguished judge upon a review of all the decisions then extant, and as one which had largely shaped the jurisprudence of this country upon this branch of equity jurisprudence. While it is true that the court was not dealing with the feature now under consideration, yet the distinction between the status of the two classes of creditors was a conspicuous feature in the opinion of Chancellor Kent. It promulgated a doctrine which embraced within its scope all creditors. The approval of the opinion of Chancellor Kent went far in the direction of an indorsement of his whole declaration, which constitutes a single and complete system touching the doctrine of voluntary settlements in respect to creditors of all kinds.

By reason of these recognitions of cases in which the distinction above mentioned has been formulated, and by reason of the rational grounds upon which such a distinction rests, I regard the complainant in this case as having the burden of showing that, at the time the conveyance was made, there existed an actual intent to hinder and delay creditors. This conclusion appears the more reasonable after an examination of the cases in the English courts dealing with this subject. From such an examination it appears that while there has been considerable fluctuation in judicial sentiment in respect to the attitude of prior creditors who attack a voluntary conveyance, there is little or none in respect to the posture of subsequent creditors. As to the latter of the two classes of creditors, the rule has been quite uniform, that an actual fraudulent intent to defraud some creditor must be proved.

In an attack upon such a conveyance by a subsequent creditor, it is true that the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent. Different equity judges have accorded to the existence of such debts different degrees of probative force, and have raised from the fact of their existence certain indisputable presumptions, but the line of adjudications is opposed to the notion that the existence of a prior debt of any amount raises a conclusive presumption that a voluntary conveyance is fraudulent as against the attack of

a subsequent creditor: May on Fraudulent Conveyances, 64.

The rule laid down by Chancellor Kent and Judge Washington is not only simple, but equitable.

A conclusive presumption against a voluntary conveyance should be raised in respect to those debts which it may be presumed were incurred upon the faith of the ownership of the property conveyed.

It is therefore inequitable that the debtor should be permitted to give away such property at the expense of a pre-existing creditor, whether the intention be good or otherwise. But as to creditors who become such without any possible inducement arising from such ownership, no such conclusive presumption should arise. No equitable consideration requires it; and besides, if such a rule be adopted, no settlement could be made which would not be at the mercy of the grantor during his lifetime. The power to incur debts would be a power to subject the property to a liability for their payment at any time. So, as already remarked, equitable considerations, as well as the weight of authority, are in favor of the rule that an actual intent to defraud, arising from all the circumstances surrounding the transaction, must be proved before a voluntary conveyance will be decreed void at the suit of a subsequent creditor. * * *

The question of fact remains to be considered, whether there was an intention existing in the mind of the parties to the present conveyance to hinder and delay creditors, which induced the execution of the deed. * * *

Note: There is a note upon the subject of Voluntary Conveyances in 14 Am. St. Rep. 739.

SEC. 2. HOMESTEAD EXEMPTIONS.

ALT v. BONHOLZER, *Supra*, p. 483.

CHRISTY v. DYER.

14 Iowa, 438; 81 Am. Dec. 493. (1862)

The defendant had purchased the property in question of the plaintiff, executing at the time a mortgage to the plaintiff to secure the purchase-money, in which his wife did not join. At the time of the purchase he was the head of a family, and designed to make the premises his home, but he did not occupy the same as a homestead until nearly two years after the purchase. After the land was so occupied, the plaintiff obtained a judgment at law against the defendant upon the note given for the purchase-money, and secured by the mortgage, with interest, and an order for a general execution. The execution was levied upon the land, and the plaintiff purchased the same, and received a sheriff's deed; and the plaintiff relies upon this title. The defendant claims a homestead right in forty acres of the tract. Verdict for the defendant as to the homestead tract, and for the plaintiff as to the residue. Plaintiff appeals.

WRIGHT, J. * * * If a tract of land is purchased by the head of a family upon which there are no improvements, but which he designs for a homestead, it may admit of some doubt whether the same would be exempt from judicial sale upon a debt contracted after such purchase and before its actual occupancy as a homestead. The spirit and policy of the law would seem to imply the "purchase of the homestead," and not that which might or not be finally made such.

Until such occupancy, the proposed creditor cannot know what it is that may be claimed as exempt. If there is an actual residence, however, he knows that the law gives the exemption. But without now further discussing this view of the case, or expressing more definitely our conclusions thereon, we pass to the consideration of other questions which are decisive of the case before us.

It will be seen that plaintiff claims under a judgment rendered upon a debt, contracted at the time of the purchase of the homestead, or rather that the debt, to satisfy which the property was sold, was a part of the purchase-money.

Plaintiff was the vendor and defendant the vendee of the premises. There are no rights of third persons intervening. Under such circumstances, it is, in our opinion, contrary to the policy of the statute to say that this debt was so contracted after the purchase of the homestead as to render the property exempt.

The legislature, with the view of avoiding all constitutional questions, has made the exemption prospective and not retrospective. When the homestead has been purchased, then, as to all subsequent debts, it is exempt; for all prior ones it is liable.

Is this a subsequent debt? The liability certainly did not arise after such purchase. The agreement to buy, and the corresponding promise to sell, was before the title papers passed. The final obligation to pay arose at the time of finally consummating the contract, when the notes were passed and the deed made. If these shall be treated as concurrent acts, can the claimed exemption be sustained? Upon the soundest principles, we think not.

The claim of defendant is, that the homestead shall not be liable for the money agreed to be paid for its purchase. And yet we are not aware of any case which holds that such claim is to be preferred to that of the vendor for the purchase-money. In this state, it has been expressly held that a subsequent homestead right will not cut off the original claim for the purchase-money: *Barnes v. Gay*, 7 Iowa. 26. In California, it is held that such homestead right is subordinate to the lien for the purchase-money: *McHenry v. Reilly*, 13 Cal. 75.

And in another case, where the husband borrowed money to pay for the homestead, giving a mortgage thereon in his own name, it was held that as the deed of the vendor, and the mortgage to such third person, were simultaneous acts, the purchaser and wife had neither an equitable nor legal right of homestead: *Lassen v. Vance*, 8 Cal. 271 (68 Am. Dec. 322). It may well be doubted whether this case is sustained by the authorities in all its parts: See *Stansell v. Roberts*, 13 Ohio, 148 (42 Am. Dec. 193); *Davis v. Peabody*, 10 Barb. 91. But however this may be, it recognized the rule that the vendor has the paramount lien, and this is sufficient for the purposes of the present case. In *Stone v. Darnell*, 20 Tex. 11, Hemphill, C. J., says: "We have held in repeated cases in favor of the vendor that his vendee, as against him, could not claim the exemption, or be shielded under it from the payment of the purchase-money, and this was on the ground that until such payment, the superior right or title in the land remained in the vendor; that the title, in fact, had not fully vested in the vendee until the discharge of the purchase-money; that the claim

of the homestead is based on the fact that the land, as against the vendor is held by an indefeasible title." And see *Shepherd v. White*, 11 Id. 346, where it is held that "if there was a resulting trust, and the nominal grantee held the land for the use of the real purchaser, the trustee could not acquire, upon the land, a homestead free from and unencumbered by the trust; he could not claim the protection of the homestead law any more than he could if he had been a real purchaser, and taken a deed absolute, but given a mortgage on the land so purchased, to his vendor, to secure the purchase-money." Also *Farmer v. Simpson*, 6 Id. 303. * * *

BOSQUETT v. HALL.

90 Ky. 566; 29 Am. St. Rep. 404; 13 S. W. 244; 9 L. R. A. 351.
(1890)

LEWIS, J. To entitle a person to the benefit of homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* housekeeper with a family, whether such debt was created before or after the homestead was acquired.

"In legal contemplation, whomsoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family": *Bell v. Keach*, 80 Ky. 42. And accordingly, an infant brother or sister, or aged and helpless parent, or even a bastard child, may and have been held to constitute a family in the meaning of the statute.

But the persons in this case residing with the debtor, though children, have no natural or legal obligation on the debtor for support, being strangers in blood to him. He may, at any time, separate from and cease to support or care for them without violating any legal or natural obligation; and to so extend the operation of the statute as to exempt the homestead in such case would be not only contrary to the policy of it, but place it in the power of a debtor, by subterfuge and fraud, to defeat his creditors. The construction and operation of the homestead law must be determined by some well-defined rule that is reasonable and just, not according to the mere will or caprice of the debtor.

It seems to us appellee is not entitled to benefit of the homestead ex-

emption, and the judgment must be reversed, and cause remanded for further proceedings consistent with this opinion.

RESKE v. RESKE, *Supra*, p. 484.

DEVILLE v. WIDOE.

64 Mich. 593; 8 Am. St. Rep. 852; 31 N. W. 533. (1887)

SHERWOOD, J. * * *

A city lot purchased with the intention of making it a homestead for the purchaser and his family, will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit.

What will be regarded as a reasonable time must necessarily depend upon the circumstances of each particular case.

The following authorities will be found to give support to the views herein expressed: Reske v. Reske, 51 Mich. 541; 47 Am. Rep. 594; Barber v. Rorabeck, 36 Mich. 399; Bouchard v. Bourassa, 57 Id. 8; Griffin v. Nichols, 51 Id. 575. See also Schofield v. Hopkins, 61 Wis. 370.

We do not think, under the circumstances of this case, that the time taken by the complainant to improve the lot in such manner as to make a comfortable home for himself and family was unreasonable; and the decree of the circuit judge must be affirmed.

SEC. 3. SPENDTHRIFT TRUSTS.

BROADWAY NATIONAL BANK v. ADAMS.

133 Mass. 170; 43 Am. Rep. 504. (1882)

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of \$75,000 to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semi-annually, to my said brother, Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of said \$75,000 shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said \$75,000, together with any accrued interest or income thereon which may remain unpaid, as hereinabove directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that if the trustee was to pay the income to the plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions however has been in favor of such a power in the founder. *Braman v. Stiles*, 2 Pick, 460; 13 Am. Dec. 445; *Perkins v. Hays*, 3

Gray, 405; Russell v. Grinnell, 105 Mass. 425; Hall v. Williams, 120 id. 344; Sparhawk v. Cloon, 125 id. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Litt. 223a; Blackstone Bank v. Davis, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and purity of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in Sparhawk v. Cloon, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. Brandon v. Robinson, 18 Ves. 429; Green v. Spicer, 1 Russ. & Myl. 395; Rockford v. Hackman, 9 Hare, 475; Trappes v. Meredith, L. R. 9 Eq. 229; Snowden v. Dales, 6 Sim. 524; Rippon v. Norton, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. Tillinghast v. Bradford, 5 R. I. 205; Heath v. Bishop, 4 Rich. Eq. 46; Dick v. Pitchford, 1 Dev. & Bat. Eq. 480; Mebane v. Mebane, 4 Ired. Eq. 131; 44 Am. Dec. 102.

Other courts have rejected it, and have held that the founder of a

trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship v. Patterson*, 7 Watts. 547; *Shankland's Appeal*, 47 Penn. St. 113; *Rife v. Geyer*, 59 id. 393; *White v. White*, 30 Vt. 338; *Pope v. Elliott*, 8 B. Monr. 56; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*, 94 id. 523.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate, which by the instrument creating it is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where

all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or limitation over, or by giving his trustee a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain, that in the exercise of his absolute right of disposition, the donor has not seen fit to give, the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

BROWN v. MACGILL.

87 Md. 161; 67 Am. St. Rep. 334; 39 Atl. 613; 39 L. R. A. 806.
(1898)

BOYD, J. This is an appeal from a decree of the circuit court of Baltimore City, dismissing the bill of complaint filed by the appellant against Sarah G. Macgill, Carroll S. Macgill, her husband, and James McEvoy, trustee. The bill alleges that on the sixteenth day of September, 1895, Sarah G. Macgill gave the appellant her note for the sum of two thousand dollars, which she borrowed from him with the understanding and agreement that it should be payable when demanded out of her separate estate, whether held in her own name or by the intervention of her trustee, James McEvoy, and that it was her intention and purpose to bind and charge her separate estate with the payment thereof. On the tenth day of September, 1894, which was a day or two before Mrs. Macgill, who was the widow of George B. Graham, deceased, was married to Carroll S. Macgill, she executed a deed of trust by which she assigned and conveyed to James McEvoy, trustee, all property which she had derived from the estate of George B. Graham, and which she might receive from her daughter, Isabelle Brown Graham, in trust, "to collect, receive, and after making all proper deductions for taxes and other charges thereon, to pay over the net rents, profits, dividends, interest, and income of all said property, real, personal, and mixed, to her, the said Sarah G. Graham, during her natural life, into her own hands and not to another, whether claiming by her authority or otherwise, for her sole and separate use and upon her separate receipts without power of anticipation, and excluding all right or interest in or power over the same of any husband she may have or any liability for his debts, contracts or engagements." It then provides for the disposition of the property after her death.

* * * But whether one who is the owner of property can thus place it beyond his own control and power of alienation—especially beyond the reach of his creditors—presents another question. The case of Warner v. Rice, 66 Md. 436, goes very far toward denying such right. George Warner and others conveyed to a trustee certain property which had been left them by their father by a deed in which certain trusts were declared by the grantors. The property of George Warner sought to be made liable to attachment in that case had by the deed been made subject to a declaration of trust as follows: "In trust for the use and benefit of said George Warner and his immediate fam-

ily, free from liability for any of his debts, contracts or engagements, and when, if so by said trustee found requisite by him deemed proper, to apply the uses, rents, income, and profits to the support and maintenance of said George and his said family during his, said George's life," *et cetera*. This court held that the exemption attempted to be conferred upon the use of the property by that declaration was void and without effect, being contrary to law, and held the rents, from Warner's equitable estate in the ground rents attached, liable for the plaintiff's debts. It was said in that case that a beneficial legal estate in fee or for life could not be conveyed or devised to a person with a provision that it should not be alienated or subject to the debts of the legal owner, and it was also stated that, as a general principle, equitable estates cannot be effectually created with such proviso, except in the case of trusts created for the protection and benefit of married women. In *Baker v. Keiser*, 75 Md. 332, the cases of *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, and *Warner v. Rice*, 66 Md. 436, were discussed, and it was said that in the latter case this court, "emphatically declared that it was wholly against the policy of the law to allow property whether legal or equitable, to be fettered by restraints upon alienation; and, generally, the court said, whenever property is subject to alienation by the owner, it is subject to his debts." It was stated in that opinion that the majority of the court concluded in *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, that there was nothing in the decision of *Warner v. Rice*, 66 Md. 436, "which should restrain the court from saying that the founder of the trust could by sufficiently clear language create a trust for the beneficiary without the power of alienation," but the opinion concluded by saying that: "This court went as far as it could in *Towers*' case to effect the intention of the testator which was so expressly declared; but proper adherence to the policy of the law in the state will not allow the extension of the doctrine of the *Towers* case beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning."

But this case of *Warner v. Rice*, 66 Md. 436, is clearly distinguishable from that of *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, and of *Reid v. Safe Deposit etc. Co.*, 86 Md. 464, inasmuch as in that case there was an attempt of the owner of the property to place it beyond the reach of his creditors and yet retain the enjoyment of it during his life, whilst in the other two cases the testators were creating trusts in favor of third persons. The theory upon which courts have held restraints upon alienation, *et cetera*, valid, is that the *cestui que trust* only has what the donor has given him—is the recipient of his

bounty—and therefore if the donor has not given him the right to alienate the property or make it subject to the payment of his debts, no one has the right to complain. As is well said in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, “under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of the trust and take more than he has given.” This is well illustrated in the Missouri cases. In *Lampert v. Haydel*, 96 Mo. 439, 9 Am. St. Rep. 358, and in *Patridge v. Cavender*, 96 Mo. 452, the doctrine has been distinctly announced that by the use of apt terms a testator could forbid the alienation of property in trust and could place it beyond the reach of the creditors of the beneficiary; but in *Bank of Commerce v. Chambers*, 96 Mo. 459, a husband who had released his curtesy in his wife’s estate, accepting in lieu thereof an income given him by her will, was regarded as a purchaser of such income and not a mere recipient of his wife’s bounty, and therefore the income was held to be subject to the claim of his creditors, notwithstanding the provisions in the will to the contrary. In referring to *Lampert v. Haydel*, 96 Mo. 439, 9 Am. St. Rep. 358, that court said that it, “and the class to which it belongs, rests in a large part upon the distinct ground that a creditor is not defrauded and therefore has no cause of complaint, because the owner of the property in the free exercise of his will so disposes of it that the object of his bounty who parts with nothing in return, has a sufficient income provided for and applied to his life support.” Even that class of cases should be carefully guarded, and the courts should not be inclined to exempt property from its usual incidents of the right of alienation and liability for debts unless the language of the donor be free from doubt. But it is going too far and is too violently assaulting the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it through the instrumentality of the trustee, and yet have the interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. It is true that our land records are open to the public, and, in contemplation of law, what is properly recorded therein is presumed to be known by all, yet the fact remains that if a person has once owned property and continues to occupy it or use it just as he has always done, it would occur to but few persons, if any, at least in ordinary transactions, that he must inquire, perhaps employ counsel to ascertain, whether there had been any change in the legal

status of such property. It may be argued that this may happen in the cases we have already said are lawful in this state, where the bounty is bestowed upon third persons, and to some extent that may be true, but in those cases persons dealing with them may perhaps be expected to ascertain what the party receives—what interest in the property was given to him—but in the case before us he would not only have to find out what property he owned in the beginning, but from time to time examine the records to see whether the former and still ostensible owner of it continued to retain any interest that was liable for his debts. It cannot be denied that property is deprived of some of its greatest value to the community in which it is held or located, when beyond the power of alienation or reach of the creditors of its present owners. To hold that a grantor can retain all the use and enjoyment of his property for life “free from the incidents of property and not subject to his debts, would be a dangerous and startling proposition to sanction.” We do not think it can be sustained by reason or authority. So far as we are aware the authorities are the other way: *Warner v. Rice*, 66 Md. 436; 4 Kent’s Commentaries, 311; *Mackason’s Appeal*, 42 Pa. St. 330; 82 Am. Dec. 517; *Ghormley v. Smith*, 139 Pa. St. 584; 23 Am. St. Rep. 215; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295 (approved as to this point in *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358); *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zeidlitz*, 136 Mass. 342. * * *

WENZEL v. POWDER.

100 Md. 36; 108 Am. St. Rep. 380; 59 Atl. 194. (1904)

McSHERRY, C. J. The questions presented by the record now before us arise on a demurrer to a bill in equity which was filed by the appellant against the appellees in the circuit court of Baltimore City. The demurrer was sustained and the bill was dismissed, and from the decree so passed the pending appeal was taken. The facts which it is necessary to state are all set forth in the bill and are, of course, not disputed. It appears that by a deed dated March 25, 1881, duly executed and recorded, one Moses Hindes Powder conveyed all his property to himself as trustee, in trust to, for and upon the following uses, trust and purposes, namely: “In trust so that the said Moses Hindes Powder, trustee herein named, shall and will receive, take and

collect all the rents, issues, income, profits and interest of said property hereby conveyed, and from all investments or changes of investments of the same, made or to be made, as hereinafter provided for, and apply the same to the support and maintenance of the said Moses Hindes Powder, and his wife and children, during the lives of the said Moses Hindes Powder and his wife, and after the death of both of them the principal of said estate and all increase thereof to become the absolute property of their children, share and share alike, the children of any deceased child to take only their parent's share, that is, that share thereof to which, if living, the parent would be entitled." In the year 1883 the Safe Deposit and Trust Company was substituted as trustee in the place of Moses Powder, and in October, 1894, the latter died.

In March, 1899, Algeria V. Powder, the widow of the settler, conveyed all her interest under the deed of trust to one Sarah A. Danskin, and in May following the latter transferred the same interest to Beryl D. Powder and Margaret D. White, the only children of the settler. During the years 1899 and 1900 the plaintiff, Charles G. Wentzel, who is the appellant here, furnished the widow and two daughters, who all lived together, with groceries and provisions, and for the sums due therefor he took the promissory notes of the two daughters and their mother. After parting with her interest in the trust property by the deed above alluded to Mrs. Powder applied for the benefit of the bankrupt law and was discharged from the payment of her debts. The appellant brought suit upon some of the promissory notes. Mrs. Powder pleaded her discharge and Beryl D. Powder, one of the daughters, pleaded infancy, but judgment was obtained against Mrs. White, the other daughter.

The pending bill was then filed, first, to have the trust declared at an end and to subject the property covered by the deed to the payment of the judgment; or, as alternative relief, to have Mrs. White's share of the income impounded and applied in satisfaction of the judgment. The appellees resist the granting of the relief sought, first, because the trust has not terminated; and, secondly, because the trust created by the deed of 1881 is a spendthrift trust, and the income is therefore beyond the reach of the creditors of the *cestui que trustent*. We will consider these two propositions in their inverse order.

Is the trust created by the deed a spendthrift trust? The terms of the deed must furnish an answer to this inquiry. It will be observed that there are no words used in the deed to indicate an intention on the part of the settler to make the income inalienable, unless the direc-

tion to the trustee to "apply the same to the support and maintenance of the said Moses Hindes Powder and his wife and children during the lives of the said Moses Hindes Powder and his wife" can be interpreted as being sufficient to accomplish that result. Clearly, as respects the settler himself, neither the words above quoted nor any others could have protected the income from attachment and condemnation at the suit of his creditors: *Warner v. Rice*, 66 Md. 436, 8 Atl. 84. And so it comes down to this: Do the words "support and maintenance," the settler being now dead, preclude the income from being alienated during the lifetime of the widow? Whenever an individual has an interest in property, which he may alien or assign, that interest, whether it be legal or equitable, is liable for the payment of his debts. "It is wholly against the policy of the law to allow property, whether legal or equitable to be fettered by restraints upon alienation, and generally whenever property is subject to alienation by the owner it is subject to his debts." *Warner v. Rice*, 66 Md. 440, 8 Atl. 84. We all know that in England it is well settled that the devise of an equitable estate or interest for life to any person, other than to a married woman, carries with it, as a necessary incident, the right of alienation by the *cestui que trust*, and that it is liable for the payment of his debts, and no provision by way of inhibition, which does not operate as a cessor or limitation over of the estate, can protect it against the claims of creditors: *Smith & Son v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92. But in this country the supreme court of the United States, the courts of last resort in some of the states and this court, have, after full consideration, determined that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of the property may so dispose of it as to secure its enjoyment by the beneficiary, without making it alienable by him or liable for his debts: *Smith v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Reid v. Safe Deposit etc. Co.*, 86 Md. 467, 38 Atl. 899; *Cherbonnier v. Bussey*, 92 Md. 421, 48 Atl. 923. The principle which lies at the root of the doctrine, applied for the first time in Maryland in the case of *Smith v. Towers*, is, that the founder of a trust being the absolute owner of the property disposed of, and having the right to prescribe the terms on which his bounty shall be enjoyed, may provide in direct terms that his property shall go to his beneficiary to the exclusion of the latter's alienees and creditors; because such a restriction is not repugnant to the estate or interest granted, nor is it such a restraint on the right of alienation as the law, for reasons of public policy, forbids.

Before proceeding to analyze the language used in the instruments with which this court dealt in the cases heretofore decided, it will not be amiss to state, in the words of the supreme judicial court of Massachusetts, the general principle applicable to the pending and similar inquiries. In *Slattery v. Wilson*, 151 Mass. 268, 21 Am. St. Rep. 448, 23 N. E. 843, 7 L. R. A. 395, it is said: "When the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be inalienable, but when the right given is for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed."

In the deed now under consideration there are no terms to denote an intention or purpose to impose a restraint on the alienation of the income other than the words we have pointed out; namely, that the trustee should apply the income to the "support and maintenance" of the *cestui que trustent*, during the lives of the settler and his wife. Starting with the case of *Smith v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92, the words which were there held to create a spendthrift trust were these: The testator devised certain real estate to a trustee in trust to collect the rents and profits, and to pay the same to his son, Robert, "into his own hands and not into another, whether claiming by his authority or otherwise," and upon his death to convey the real estate to the children of the *cestu que trust*. The difference between the phraseology of that will and the deed before us is obvious at a glance, and we need not pause to comment on it. In *Maryland Grange Agency v. Lee*, 72 Md. 161, 19 Atl. 534, a testatrix devised all her property, real and personal, to her sons, in trust for the support, maintenance and education of their respective families, to be held by them, and the rents and profits thereof, and she declared that no part of the land should be made liable, in any event, for their debts and contracts; and it was held that the crops growing thereon were likewise exempted from liability. In *Reid v. Safe Deposit etc. Co.*, 86 Md. 464, 38 Atl. 899, it appeared that the testator devised and bequeathed to trustees all his property "in trust, to hold and manage the same and collect, etc., and to pay the net proceeds from time to time to my wife, Louisa Presbury, for the term of her natural life, and especially so that the same shall not be liable for the debts or contracts of any future husband or in any manner subject to his control, or to be taken in execution or attachment or otherwise howsoever, and so

that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." It was said by the court, "These terms are too explicit and clear to be misunderstood," and it was held that the income in the hands of the trustee was not subject to attachment for a debt due by the *cestui que trust*. In *Brown v. Macgill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806, this state of facts existed: Before her marriage a woman conveyed her property to a trustee to collect the rents, etc., and to pay the net income to her and "into her own hands and not to another, whether claiming by her authority or otherwise, for her sole and separate use and upon her separate receipts without power of anticipation. After her marriage she became indebted to the plaintiff and charged her separate estate with the payment thereof, and it was held that the trustee under the deed should be required to pay the debt due to the plaintiff out of the income of the estate in his hands because she could not place her property beyond the reach of her own creditors. In *Jackson Square Assn. v. Bartlett*, 95 Md. 661, 93 Am. St. Rep. 416, 53 Atl. 426, the language of the will, in which a testatrix bequeathed property to a trustee with direction to pay the income, to her son, was, "as it shall accrue and not by way of anticipation to my said son for the support of himself and his family, the receipt of my said son to be a sufficient acquittance to my said trustee therefor, but my will is that my said son shall have no power to charge, encumber or anticipate the said income"; and it was held that a spendthrift trust was created and that the interest of the *cestui que trust* in the income was not liable to attachment by his creditors.

The case at bar is in no respect analogous to those where a spendthrift trust has been sustained. There is no provision in the deed attempting to place a restraint on the alienation of the income, and there is no prohibition against that income being seized by creditors of the beneficiaries. In point of fact, one of the *cestui que trust* has actually conveyed away her interest in the income to the others. The two daughters are consequently the only beneficiaries entitled to the income. The declaration that the trustee is to apply the income for their maintenance and support is simply the declaration of the general trust for their benefit. And the record shows that the parties have uniformly acted upon that theory. The trustee has never expended the income for the support and maintenance of the beneficiaries. The trustee has merely paid over to one of the beneficiaries at stated periods the income as it accrued and the party thus receiving it expended it. The debt which the appellant seeks to recover was con-

tracted by the beneficiaries for food, and therefore for articles used in their support and maintenance; and if the interest to accrue on the trust fund is applied to the payment of that debt, it will be applied to the support and maintenance of the *cestui que trust*. Here the whole income is given to the beneficiaries for their support. The thing given is not a mere right to a support out of a fund; in which event the amount bestowed would be indefinite, and would be in its nature inalienable and beyond the reach of creditors; but the thing given is the whole income without any arbitrary discretion being lodged in the trustee as to its application. Where trustees have an arbitrary power of applying such part of an income as they see fit to the support of a *cestui que trust*, and for no other purpose, it was held that nothing passed to the assignees of the beneficiary: 1 Perry on Trusts, sec. 386B, citing Twopenny v. Peyton, 10 Sim. 487; In re Sanderson's Trust, 3 Kay & J. 497; Lord v. Bun, 2 Younge & C. 98; Holmes v. Penny, 2 Kay & J. 90. In the same section the author continues: "But if the power is not arbitrary, but is imperative on the trustee to pay over the income for the support of the *cestui que trust* and another person or persons, the assignees are entitled to take a part upon the insolvency of one, or the whole in the event of the death of the others"; citing Rippon v. Norton, 2 Beav. 63; Wallace v. Anderson, 16 Beav. 533; Percy v. Roberts, 1 Mylne & K. 4.

The case at bar does not fall within the principles applied in any of the decisions heretofore rendered by this court in sustaining a spendthrift trust, and to bring it within the former rulings on this subject the doctrine imposing a restraint on the alienation of an equitable life estate would have to be expanded and stretched much farther than it has hitherto been carried. As the deed gives the whole income for the support and maintenance of the beneficiaries, the whole belongs to them, and the statement of the purpose for which it has been given cannot be deemed an expression of an intention that it shall not be alienable.

2. We do not consider that the trust has terminated. There is a contingent limitation over to the children of the daughters who may come into being during the life of the widow of the settler, should either of the daughters die leaving issue during the life of the widow.

The conclusion we have reached is that the share of Mrs. White in the income is liable for the payment of the judgment recovered against her. As this view differs from the one reached by the circuit court, the decree dismissing the bill will be reversed and the cause will be remanded.

Decree reversed with costs above and below and cause remanded.

NICHOLS, ASSIGNEE, v. EATON et al.

91 U. S. 716; 21 L. E. 254. (1875)

Appeal from the Circuit Court of the United States for the District of Rhode Island.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will, she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest, and income of the trust-property to her four children equally, for and during their natural lives, and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition, that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust-fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given *verbatim*, as follows:—

“Provided also, that in case at any future period circumstances

should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust-fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue, and unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of testatrix by a former husband), were the executors and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust-estates to Amasa M. Eaton should cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given *verbatim*, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to

receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

Upon a final hearing the Circuit Court dismissed the bill, and Nichols appealed to this court. * * *

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 433, "If property is given to a man for his life, the donor cannot take away the incidents of a life-estate."

There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon v. Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Demmill v. Bedford*, 3 Ves. 149; *Brandon v. Robinson*, 18 id. 429; *Rockford v. Hackmen*, 9 Hare; *Lewin on Trusts*, 80, ch. vii., sect. 2; *Tillinghast v. Bradford*, 5 R. I. 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. If the bankrupt devisee had a wife or child living to take under this branch of the will, there does

not seem to be any doubt that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in *Lewin on Trusts*, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid and the entire interest passes to them; but that if the devise be to him and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. *Page v. Way*, 3 Beav. 20; *Perry v. Roberts*, 1 Myl. & K. 4; *Rippon v. Norton*, 2 Beav. 63; *Lord v. Bunn*, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. *Twopenny v. Peyton*, 10 Sin. 487; *Godden v. Crowhurst*, id. 642.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far, any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopenny v. Peyton* and *Godden v. Crowhurst*, above cited from 10 Sim., seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no farther than to hold, that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition, that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before use, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them,"—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. *Hill on Trustees*, 486; *Lewin on Trusts*, 538; *Boss v. Goodsall*, 1 *Younge & Collier*, 617; *Maddison v. Andrew*, 1 *Ves. Sr.* 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chan-

cery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the

obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher v. Taylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life-estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to

secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust-estate, explicitly designating the uses and defining the powers of the trustees. * * * Nor is such a provision contrary to the policy of the law or to any act of assembly. Creditors cannot complain because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship v. Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the instalments which they had promised to pay could not be diverted by his creditors to the payment of his debts; and Gibson, C. J., remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the estate being vested in trustees, the son could not alienate. *Shankland's Appeal*, 47 Penn. St. 113.

The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashurst v. Given*, 5 W. & S. 323; *Brown v. Williamson*, 36 Penn. St. 338; *Still v. Spear*, 45 id. 168.

In the case of *Leavitt v. Bierne*, 21 Conn. WAITE, J., in delivering the opinion of the court, says, "We think it in the power of a parent to place property in the lands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustee;" and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al. v. Handly et al.*, 10 Gratt, 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and

wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors v. Elliott Co.*, 8 Ben. Monr. 56, the testator had directed his executors to pay for the support of Robert Pope the sum of \$25 per month. Robert Pope having been in the Rocky Mountains until the sum of \$225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of \$25 per month, or \$300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. After an examination of the statutes of Kentucky and the general principles of equity jurisprudence on this subject, they hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of *Campbell v. Foster*, 35 N. Y. Court of Appeals, 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust-fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any further examination into the decisions of the State courts. We have indicated our views in this matter rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of

the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel; such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also, that, since his bankruptcy, the defendant, Amasa, has actually received \$25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent,—a will which, as we have shown, she had a lawful right to make,—the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignee in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

Decree affirmed.

SHELTON v. KING.

229 U. S. 90; 57 L. Ed. 1086; 33 Sup. Ct. 686. (1912)

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill to determine a trust under the will of Anna Smith Mallett. The material clauses are in these words:

"3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin, John Consider Shelton, deceased, all of Bridgeport, Connecticut, the sum of Seventy-five Thousand dollars, being Twenty-five Thousand to each.

"10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton,

CODICIL.

* * * "In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

The complainants are the three legatees, Jean L. Shelton, now more than twenty-one years of age, and Anna Gertrude and Robert Philo Shelton, not yet twenty-one, who sue by their guardian. As the youngest of the legatees was not born until 1896, the bill is premature by many years, if the trust created by the codicil is to be regarded.

That the respective legacies are vested and absolute is undeniable. No other person has any interest in them, and if the trustees should disregard the time of payment, and pay over to each legatee his or her legacy when they are competent to give a valid discharge, there would be no one who could call them to account. But the trustees, having regard to the express wish of the testatrix, have refused to terminate the trust, and the object of this proceeding is to compel them to pay over the shares of the legatees as they reach the age of twenty-one years.

The objects of the bounty of the testatrix were distant kinspeople. Besides their postponed legacies they were given the residuum of the estate. What that was does not appear. It is not claimed that they are in want, nor that anything has happened since the will which was not anticipated by the testatrix, and no special reasons are claimed for terminating the trust because of new conditions which she did not take into account. In *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, a situation arose after the will, which the court thought had not been contemplated by the testator, and for which no provision had been made. The court therefore saw in that a reason for terminating a like trust. In the case at bar no ground, aside from the alleged illegality of the trust, is suggested for defeating the wishes of Miss Mallett, other than that it will be convenient and will save the cost of continuing the trust.

The trust is not dry, but is active, and must continue, if not invalid, until the time of payment arrives. Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin, Trusts 2d Am. ed. 448; Nichols v. Eaton, 91 U. S. 716, 724, 23 L. ed. 254, 256.

There being in this case no ground for saying that there have arisen circumstances and conditions for which the testatrix made no provision, we may not control the trustee, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy.

There is no pretense of perpetuity. Creditors are in no way concerned. If the testatrix saw fit to have this fund accumulate in the hands of trustees, and thereby postpone the enjoyment of her gift, why shall her will be disregarded? The restriction she imposed may protect her bounty against ill-advised investments and waste or extravagance. She did not undertake to guard against alienation, except in so far as the alienees will take subject to the same postponement of payment. Stier v. Nashville Trust Co., 85 C. C. A. 422, 158 Fed. 601. Nor did she undertake to protect against creditors as in Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254. The single restriction she imposed upon her gift was that the legacies should not be paid until the time named, and in the meantime should be held in trust.

The appellants contend that whether the trust be active or dry, it is one for the benefit of the legatees, and, as no other person has any interest in the legacies, may be waived by them. For this they cite Saunders v. Vautier, 4 Beav. 115, and Wharton v. Masterman (1895) A. C. pp. 186, 193. In Saunders v. Vautier it was laid down, without argument, that "where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute, indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." The point thus decided in Saunders v. Vautier was followed in Wharton v. Masterman, where Lord Herschell said very significantly: "The point seems, in the first instance, to have been rather assumed than decided. It was apparently

regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

"It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it."

The doctrine thus stated is the plain outgrowth of certain earlier English decisions in the interest of creditors which hold, in substance, that the necessary incidents of beneficial ownership in property are liability to creditors and the power of alienation. Having concluded that a testator could not so bestow that which was his own to an object of his bounty as not to be subject to the claims of creditors of the latter, it was a logical conclusion that a testator could not postpone the payment of a vested and absolute legacy beyond the time when the legatee should be able to give a valid discharge. But the acceptance of the principle upon which *Saunders v. Vautier* and *Wharton v. Masterman* rest involves the acceptance of the limitation which the earlier English cases place upon the powers of a testator in so disposing of his property that it may be enjoyed by the recipient without liability to creditors. The foundation of the English doctrine in both classes of cases is an assumption that there is some settled principle of public policy which subjects all property in which one has a beneficial ownership to the claims of creditors, and forbids restraint upon alienation. That this theory of public policy is not of universal application, at least, in this country, is manifest from the numerous exemption statutes existing which protect to a limited extent the acquisitions of a debtor from the claims of his creditors, and restrain his power of alienation in the interest of his family. Neither do we for a moment question the rule that one may not by his own act preserve to himself the enjoyment of property in such manner that it shall not be subject to the claims of creditors, or placed beyond his own power of alienation.

But a very different question is presented when we come to the powers of a testator to so bestow that which is absolutely his own as to secure its beneficial enjoyment by an object of his bounty without being subject to the claims of assignees or creditors. This court, and the courts of a number of the states of the Union, have not accepted

the limitation which the English courts have placed upon the right of testamentary disposition, and have sustained trusts having as an object the application of a testator's bequest to the support and maintenance of the recipient of his bounty. They have therefore rejected the assumption that liability to creditors and freedom of alienation are necessary incidents to the right to enjoy the rents and profits of real estate, or the income from other property.

In the leading case of *Nichols v. Eaton*, 91 U. S. 716, 727, 23 L. ed. 254, 257, Mr. Justice Miller, speaking the unanimous voice of this court, said of the English doctrine to which we have referred, and upon which *Saunders v. Vautier* must in principle rest:

"We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

Touching the theory that public policy forbids restraints upon the disposition of a testator's bounty, the court said:

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can

do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

In *Hyde v. Woods*, 94 U. S. 523, 526, 24 L. ed. 264, 265, this court said of *Nichols v. Eaton*, *supra*:

"In that case, the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy.

"But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

If such a trust as that upheld in *Nichols v. Eaton* was not in violation of principles of public policy, it must follow that one which neither restrains creditors nor alienation is not. If that case is to stand, the decree of the court below was right.

The principle upon which *Nichols v. Eaton* stands is in line with the views of a number of other courts. Many of them are cited in that opinion, and to those we add: *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Henson v. Wright*, 88 Tenn. 501, 12 S. W. 1035; *Brooks v. Raynolds*, 8 C. C. A. 370, 16 U. S. App. 679, 713, 59 Fed. 923; *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Keyser v. Mitchell*, 67 Pa. 473; *Seymour v. McAvoy*, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 946; *Steib v. Whitehead*, 111 Ill. 247; *Wallace v. Campbell*, 53 Tex. 229; *Garland v. Garland* (*Day v. Slaughter*), 87 Va. 758, 13 L. R. A. 212, 24 Am. St. Rep. 682, 13 S. E. 478; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113, 9 Am. St. Rep. 358, 9 S. W. 780.

Clafin v. Clafin, 149 Mass. 19, 3 L. R. A. 370, 14 Am. St. Rep. 393, 20 N. E. 454, was a case, on its facts, like the case at bar. The testator gave the residue of his estate to trustees in trust to sell and dispose of as follows: \$10,000 to a son when of age; a like sum when he reached twenty-five years and the balance when he should reach the age of

thirty years. When the son reached the age of twenty-one the trustee paid him \$10,000, and thereupon he filed a bill in equity to obtain the whole of the fund. The Massachusetts court held the trust valid and dismissed the bill. Referring to *Broadway Nat. Bank v. Adams, supra*, where a trust for support and maintenance had been upheld against creditors, the court said:

"The decision in *Broadway Nat. Bank v. Adams, supra*, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reached the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."

Stier v. Nashville Trust Co., decided by the sixth circuit court of appeals (85 C. C. A. 422, 158 Fed. 601), is also directly in point.

The case of *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, has been cited as in conflict with *Clafin v. Clafin*. It is not. In the former case it appeared that there had occurred circumstances which the testator had not contemplated, on account of which the court saw no reason for not terminating the trust. The case was distinguished in *Clafin v. Clafin*.

In the case at bar nothing has happened since the will which was not anticipated by the testatrix. The case falls, therefore, precisely within the later case of *Clafin v. Clafin*. There is no reason for declaring the trust invalid. There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.

Decree affirmed.

CHAPTER XXXIII.

PERSONAL DISABILITIES.

Section 1. Infancy.

Section 2. Mental Incapacity.

SEC. 1. INFANCY.

CRAIG v. VAN BEBBER.

100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906. (1890)

BLACK, J. This is an action of ejectment for one hundred acres of land commenced by Ella Craig and her husband, Daniel Craig, against Van Bebber, Tully, and Sprankle. The plaintiff, Ella Craig, inherited the land from her father, and she and her husband conveyed the same to Henderson Tabor by a deed dated the 28th of July, 1884, for the consideration of \$1,463. Of this amount Tabor paid in cash \$350, and executed to them his four notes due in one, two, three, and four years for the balance of the purchase price, and secured the same by a deed of trust on the land. The sale was made through an agent, and the agreement was, that the plaintiffs should have the first deed of trust. It seems, however, that Tabor gave a deed of trust on the land to secure a debt of eight hundred dollars, which was, by some manipulation, made prior in point of time to the one given the plaintiffs for purchase-money. This prior deed of trust was made by Tabor to one J. B. Watkins, as trustee. By virtue of authority set out in the deed of trust, Watkins constituted W. J. Patterson his attorney in fact to act for and in his behalf. Patterson, as such attorney in fact for Watkins, advertised and sold the property to defendant Sprankle on the 8th of October, 1886. The other defendants are the tenants of Sprankle.

The plaintiff, Ella Craig, was a minor sixteen years of age when she and her husband executed the deed to Henderson Tabor. The notes executed by Tabor are now in the possession of the plaintiffs, and have not been paid. Mrs. Craig became eighteen years of age on

the eighteenth day of March, 1886, and this suit was commenced in November, 1886, to disaffirm the deed made by her while a minor.

Plaintiffs did not offer to refund the \$350. The evidence offered to show a ratification is, in substance, this: As soon as the plaintiffs learned that their deed of trust was a second lien instead of the first, they demanded a first deed of trust according to their contract, but their demand was refused. They also demanded payment of the notes, which was refused. They executed a new deed after the wife became of age, and offered to deliver it provided the notes were paid or secured by a first deed of trust, but upon no other condition. The plaintiff, Daniel Craig, being asked if any suit had been brought for the collection of the notes, said: "I think there has been; at Linneus, I think." It does not appear when the suit was brought, or what became of it. The notes, it is agreed, are in the possession of plaintiffs.

1. The point made here, and by a refused instruction, that the plaintiffs should have in terms set out in their petition and pleaded disaffirmance of the deed, is not well taken. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first: *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441. So, too, the deed executed while a minor may be avoided by a suit in ejectment after majority: 1 *Hare and Wallace's Am. Lead. Cas.*, 317; *Tiedeman on Real Property*, sec. 793. A petition which is in the ordinary form of an action of ejectment is sufficient.

2. Defendants asked, but the court refused to give, the following declaration of law: "The infancy of Ella Craig does not entitle plaintiffs to recover, as no offer or tender was made by them to return to Sprankle funds or consideration received by Ella Craig, arising from the sale and conveyance of the land by her to Tabor."

The theory of this instruction is, that plaintiffs were bound to make a tender to Sprankle of the \$350 paid them by Henderson Tabor, the grantee in the deed which the plaintiffs seek to avoid. Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age, repudiates the transaction, he must return the property or consideration received. This general rule has often been stated without any qualification whatever. But the weight of authority is, that the rule can only apply where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender: *Tyler on Infancy*, 2d ed., sec. 37; *Green v.*

Green, 69 N. Y. 553; 25 Am. Rep. 233; Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117; Reynolds v. McCurry, 100 Ill. 356; Brandon v. Brown, 106 Ill. 519; Price v. Furman, 27 Vt. 268; 65 Am. Dec. 194; Walsh v. Young, 110 Mass. 396. The privilege of repudiating a contract is accorded an infant, because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed. Kerr v. Bell, 44 Mo. 120, Highley v. Barron, 49 Mo. 103, and Baker v. Kennett, 54 Mo. 82, are cited as affirming the general rule before stated, without any exception, and some expressions used would seem to lead to that result; but a careful consideration of the facts of these cases will show that there was no occasion for considering the exception. The remarks there made must be read and understood in the light of the facts before the court. We entertain no doubt but the rule, with the qualification before stated, is the correct one.

The instruction is, therefore, faulty, and especially so in view of the evidence that Mrs. Craig did not have any money or property save the land in question. The notes are in the hands of the plaintiffs, and the fact of disaffirmance will discharge the maker; for the law is well settled that the infant, having repudiated his or her deed, cannot recover the unpaid purchase price.

3. The evidence fails to make out a *prima facie* case of ratification. There is no evidence that either Mrs. Craig or her husband ever received any part of the purchase price after she attained her majority. She and her husband did offer to execute and deliver a confirmatory deed upon being paid the balance of the purchase price, namely, \$1,113, or upon receiving a first deed of trust upon the land securing that amount; but it did not suit the purposes of Tabor, or any other of the interested parties, to comply with that condition.

A mere acknowledgment that a debt exists or that a contract has been made will not constitute a ratification: Baker v. Kennett, 54 Mo. 82. There must be an intention to affirm the deed. A deed of confirmation is not necessary, but the act relied upon must be of such a nature as to show a clear intention to confirm the deed. An offer to make a deed of ratification upon the condition that the unpaid purchase price is paid or secured is no evidence of a confirmation. It rather shows a disposition to disaffirm should the proposed condition not be performed.

4. This suit was brought for the very purpose of disaffirming the deed made by Mrs. Craig, and she was a proper and a necessary party

plaintiff. Her husband is but a nominal party to the suit. But it is insisted that the wife cannot recover, because the husband is entitled to the possession of her land, and that he cannot recover, because by joining her in the deed he parted with his possession and right of possession.

Mrs. Craig held the land in question as her general property under section 3295 of the married woman's act. That section declares that a conveyance made by the husband during coverture of any interest in such real estate shall be invalid, unless the deed is executed jointly by the wife and husband, and by her duly acknowledged. This statute, it has been held again and again, very materially modifies the common-law marital rights of the husband in the lands belonging to the wife. It is, so far as he is concerned, a disabling statute; so that he is utterly powerless to charge or convey the land, or the rents, issues, or products thereof, except by a deed jointly executed by himself and wife: *Muel-ler v. Kaessmann*, 84 Mo. 323; *Gitchell v. Messmer*, 87 Mo. 131; *Gilliland v. Gilliland*, 96 Mo. 522; *Wilson v. Albert*, 89 Mo. 537.

If the deed jointly executed by husband and wife is invalid as to the wife, because not properly acknowledged by her, or because her signature has been procured by fraud, then it is ineffectual to convey the husband's limited marital interest: *Goff v. Roberts*, 72 Mo. 571; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Mo. 538; *Hord v. Taubman*, 79 Mo. 101. These authorities show that a conveyance by husband and wife of the lands of the wife, to be valid as against the husband, must be valid as against the wife. Now, it is true that in the cases cited the deeds were worthless from the beginning, whilst here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole.

The law of this case is with the plaintiffs, and the judgment is affirmed.

Note: See note to this case, 18 Am. St. Rep. 569 for a citation of authorities upon many points involved in deeds of infants.

IRVINE v. IRVINE.

9 Wall. U. S. 617; 19 L. Ed. 800. (1869)

MR. JUSTICE STRONG delivered the opinion of the court.

* * * His second point was that the deed was void because made by the plaintiff during his minority. This the court refused to affirm. Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title. And there are some cases, of which the present, in one aspect of it, may possibly have been one, in which such a deed is held to be not even voidable. They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do. Whether this was such a deed need not be considered, for conceding that it was not, clearly it was not void. * * *

SEC. 2. MENTAL INCAPACITY.

LINDSEY v. LINDSEY.

50 Ill. 79; 99 Am. Dec. 489. (1869)

LAWRENCE, J. On the 27th of January, 1862, Stephen Lindsey, Sen., then eighty-seven years old, conveyed to his youngest son, Hezekiah, his farm in Fulton County, containing 270 acres, and executed to him a bill of sale of three horses, two cows, some hogs, and his farming utensils. At the same time, the son executed to his father seven notes for \$150 each, secured by a mortgage on the farm, and also a bond in the penal sum of \$1,000, conditioned for the support of his father during his life. His father died on the 2d of September, 1864, and a part of the heirs, brothers and sisters of Hezekiah, have filed this bill to set aside said deed and bill of sale, on the ground that Stephen Lindsey, Sen., was, at the time of their execution, mentally incapable of contracting, and that he had been subjected to undue influence on the part of Hezekiah. The defendant answered, denying these allegations in the bill; and the case, having been heard on the bill, answer, replication, and proofs, the circuit court dismissed the bill.

The evidence is quite voluminous, and we cannot undertake to dis-

cuss it in detail. An attentive examination of it, however, has satisfied us the court did not err in this decree.

There is no proof whatever that anything was ever said or done by Hezekiah for the purpose of influencing his father to enter into this transaction. So far as appears, he was merely an assenting party, his father having, some eighteen months before this affair occurred, executed two wills, drawn by the witness Bailey, with substantially the same purpose in view that was sought in this transaction, but finally preferring to give the matter this shape. So far as the case depends upon the exercise of improper influence, we must regard it as altogether unsustained by proof.

Was there, then, such mental imbecility on the part of the senior Lindsey, as to justify a court in setting aside the deed on that ground alone? Before a complainant can claim such a decree, in the absence of undue influence, he must show such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests. The circumstance that the intellectual powers have been somewhat impaired by age is not sufficient, if the contracting party still retains a full comprehension of the meaning, design, and effect of his acts: Story's Eq. Jur., secs. 235 *et seq.* Tried by this rule, these instruments must stand. As in most cases of this character, there is a good deal of contradiction in the evidence. It is a family feud, and as the witnesses were testifying to their opinions as to the mental capacity of the deceased, we must expect much contrariety in the testimony. All, however, that appellants can fairly claim to have established is, that Stephen Lindsey, Sen., during the latter years of his life, was subject to occasional attacks of epilepsy, and for several days after an attack he would be disqualified for business. But on the other hand, it is conclusively shown by Bailey, his neighbor and adviser, and by Frisbie, the justice of the peace, who drew the deed, that he was, at the time of this transaction, in the full possession of his faculties, and perfectly cognizant of the meaning and effect of his acts. Bailey, an intelligent witness, went with him from his farm to the village of Vermont, where the papers were executed, and during this drive, while by themselves, the son not being in the sleigh, he explained his views and objects in making the deed, and the witness testifies, "his mind was as clear as I ever knew it to be." Bailey remained until the transaction was consummated and his testimony, and that of Frisbie, the justice, are to the same effect, and of a very conclusive character. The testimony of his physician, as to his capacity to transact business when not under the influence of the epileptic attacks, is equally pos-

itive. It is, however, upon the testimony of Bailey and Frisbie that we more particularly rely, because the influence of the epileptic attacks is shown to have been only temporary, and their evidence proves that at the time of this transaction he was abundantly able to transact business.

There are cases in which, some degree of mental weakness having been shown, the courts have inferred the exercise of undue influence from the character of the transaction. In the case before us, no such inference is to be drawn. The defendant had come with his family from Missouri in 1856, at the request of his father, to live with him in his old age. He was the youngest child, and the other children had already been assisted by him to a greater extent than the defendant had been, and were in better circumstances. Under these circumstances, it is not evidence of either mental imbecility or undue influence that the deceased conveyed this property to his son for a fraction of its value, taking from him notes secured by mortgage for such sum as he thought equitable, for the benefit of his other children, and a bond for his own maintenance during the remainder of his life.

The decree must be affirmed.

Decree affirmed.

DEXTER v. HALL.

15 Wall. (U. S.) 9; 21 L. Ed. 73. (1872)

MR. JUSTICE STRONG delivered the opinion of the court.

The prominent question in this case is, whether a power of attorney executed by a lunatic is void, or whether it is only voidable. The Circuit Court instructed the jury that a lunatic, or insane person, being of unsound mind, was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, was absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*,

has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable.

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable, and not void. In *Beverly's Case*, which was a bill for relief against a bond made by Snow, a lunatic, it was resolved that every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim of law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. A second reason given for the rule was, "because when he recovers his memory he cannot know what he did when he was *non compos mentis*." Neither of these reasons are now accepted, and the maxim no longer exists. There were other things ruled in *Beverly's case*, among which were these: that the disability of a lunatic is personal, extending only to the party himself, except that it extends to privies in tenure, as lord by escheat, and privies in estate, as tenant in tail; but that privies in blood, as heirs, or privies in representation, as

executors or administrators, might show the disability of the ancestor, or testator, or intestate. It was also resolved that acts done in a court of record were not avoidable even in equity. Lord Coke, in commenting on the case, remarked that "as to others there is a great difference between an estate made in person and by attorney; for if an idiot, or *non compos mentis*, makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir the land shall not escheat; * * * but if the feoffment is made by letter of attorney, although the feoffor shall never avoid it, yet after his death, as to all others, in judgment of law, the estate is void, and therefore in such case, if his heir is within age, he shall be in ward; or, if he dies without heir, the land shall escheat." Such also is the rule as stated in Fitz Herbert's *Natura Brevium*. This is plainly a recognition of the principle that the letter of attorney of an idiot or lunatic is void, though he may not be permitted himself to assert its nullity. His heir, and all others, may. The doctrine is also asserted that as against the heirs of a lunatic his deed is invalid, and this, we think, has been steadily maintained in England.

In *Thompson v. Leach*, reported in *Carthew*, and in *Comberbach*, a clear distinction was taken between the feoffment of a lunatic taking effect by livery of seizin, and his deed of bargain and sale, his surrender, or grant. The former was held to be voidable only because of the solemnity of the livery, while the latter were held to be void. The case was ejectment brought by a lunatic's heirs, and the controlling question was whether his deed was only voidable, or whether it was absolutely void. The grantor had a life estate upon which were dependent contingent remainders, and he made a deed of surrender. If his deed was at any time effective before the contingency happened, it merged the tenancy for life, and destroyed the contingent remainders, and though the deed might afterwards be avoided by any means in law, yet the contingent remainders, being once extinct, could not be revived by any matter *ex post facto*. It was necessary, therefore, to determine whether the deed was a nullity or whether it was good until avoided. The court resolved that the deed was void, *ab initio*, because of the grantor's lunacy. It was said that "there is a difference between a feoffment and livery made *propriis manibus* of an infant, and the bare execution of a deed by sealing and delivery thereof, as in cases of grants, surrenders, releases, &c., which have their strength only by executing them, and in which the formality of livery of seizin is not so much regarded in the law, and, therefore, the feoffment is not void, but voidable; but surrenders, grants, &c., of an idiot are void *ab initio*."

The case is a leading one, and it is in some respects more fully reported in Salkeld. There it appears not only that the distinction mentioned is recognized, but that Holt, C. J., declared the deed of a person *non compos mentis* to be void; that if he grants a rent, and the grantee distrains for arrears, he may bring trespass; that his letter of attorney, or his bond, are void, because, as he stated, the law had appointed no act to be done for avoiding them. *Thompson v. Leach* has never been disturbed, and, so far as we know, has never been doubted. It was followed by the case of *Yates v. Boen*, in *Strange*, which was an action of debt upon articles. The defendant pleaded "*non est factum*," and offered to give lunacy in evidence. Upon the authority of *Thompson v. Leach*, and *Smith v. Carr*, decided in 1728, the evidence was received.

The doctrine of *Thompson v. Leach* was asserted also in *Ball v. Mannin*, decided in the House of Lords in 1829. In that case the sole question presented was, by agreement of counsel, whether the deed of a person *non compos mentis* was invalid at law. In the inferior court the judge had charged the jury that "to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life," and refused to charge that the unsoundness of mind must amount to idiocy. The ruling was sustained by the Court of King's Bench in Ireland, and, on writ of error, by the Exchequer Chamber. The case was then removed to the House of Lords, and the judgment was affirmed. It is, therefore, the settled law of England, and it has been since the decision in *Thompson v. Leach*, that while the feoffment of an idiot, or lunatic, is only voidable, his deed, and especially his power of attorney, are wholly void. And now by act of Parliament, 7th and 8th Vict. ch. 76, 7, his conveyance by feoffment, or other assurance, is placed on the same footing with his release or grant.

Sir William Blackstone, it is true, appears to have overlooked the distinction made in *Thompson v. Leach*; and in his commentaries, while admitting that the law was otherwise prior to the reign of Henry VI, asserted the doctrine that the conveyances of idiots and persons of *non sane* memory, as well as of infants and persons under duress, are voidable, but not actually void. But Sir Edward Sugden notices this statement with disapproval. His remarks are as follows: "When *Beverly's* case was decided it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid down that deeds of lunatics are avoidable

only, and not actually void. But in *Thompson v. Leach* the distinction was solemnly established that a feoffment with livery of seizin of a lunatic, because of the solemnity of the livery, was voidable only; but that a bargain and sale, or surrender, &c., was actually void. This, therefore, was the ground of the decision in *Yates v. Boen*. When the Chief Justice remembered that an innocent conveyance, or a deed, by a lunatic, was merely void, he instantly said, that *non est factum* might be pleaded to it and the special matter be given in evidence."

In this country there has been inconsistency of decision. Some courts have followed Mr. Justice Blackstone, and *Beverly's Case*, without noticing the distinction made in *Leach v. Thompson*, *Yates v. Boen*, and other English cases. Such are the decisions cited from New York, beginning with *Jackson v. Gumaer*, and those relied upon made in other States. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority but conveys no interest, is not wholly void. And in Pennsylvania, in the *Estate of Sarah De Silver*, it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So also in *Rogers v. Walker*, which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase-money, or the cost of improvements, and Chief Justice Gibson said: "Since the time of *Thompson v. Leach*, it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason, that the law does not allow him to stultify himself,—an early absurdity of the common law, which was exploded with us by *Bensell v. Chancellor*."

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield, in *Zouch v. Parsons*, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney), are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void. So it has been decided in Ohio, in Kentucky, in Massachusetts, and in New York.

In fact we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must, therefore, be concluded that the Circuit Court was not in error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void. * * *

BLINN v. SCHWARZ.

177 N. Y. 252; 101 Am. St. Rep. 806; 69 N. E. 542. (1904)

* * * VANN, J. The deed in question and both powers of attorney were executed by the plaintiff when he was of unsound mind and incapable of attending to his affairs, as the jury might have found. About two years and a half after he recovered his mind he sued his agent and trustee for a general accounting, and the allegations of his complaint would have permitted the recovery, among other moneys, of the sum of seventy-seven thousand seven hundred and fifty dollars paid by the defendant Julia Schwarz upon the purchase of the property in question. The plaintiff did not allege in his complaint in that action that his agent had received that sum, or any specific money, and it does not expressly appear that he knew when he brought the action what sums had been paid, or under what circumstances, or for what property. After that complaint had been put in evidence by the defendants, however, the burden was upon the plaintiff of explaining the same, or of showing what he could in answer thereto, but the record contains nothing upon the subject. As he had never been adjudged a lunatic, he could not proceed on the assumption that he was insane, as he alleged, for that was a question for the jury. The lapse of time between his recovery and his act has an important bearing upon what he is presumed to have known. While neither power of attorney specifically covered the receipt of money paid in consideration of property conveyed by the plaintiff in person, still the general powers were broad enough to authorize the agent and trustee to collect the same.

Although the plaintiff, in the action now before us, excepted to the direction of a verdict in favor of the defendants, he did not rest there but asked to have the question of his insanity at the time of the making of the deed to Mrs. Schwarz submitted to the jury. He did not ask to go to the jury on the whole case, or upon any other question, and by requesting that the question of insanity only should be submitted, he

waived the right to have the question of ratification, so far as it was one of fact, sent to the jury. The evidence warrants the conclusion that the plaintiff ratified the act of his agent as well as his own with reference to the deed under consideration, provided the deed and the powers of attorney were not absolutely void, but merely voidable. As we must assume that the plaintiff was insane when he executed those instruments we thus reach the principal question presented by the record, as to whether the contract of a person actually insane, but never so adjudged, is void, or merely voidable, at his election.

Using the term in its exact sense and limiting it to the parties themselves, a void contract is binding upon neither and cannot be ratified. Even if ratified in form by both, it would be a new contract and would take effect only from the date of the attempt at ratification. A voidable contract, on the other hand, binds one party but not the other, who may ratify or rescind at pleasure. The word "void" however, is used both in statutes and in decisions of the courts, with several meanings and seldom with the exact one. This is illustrated by an opinion of the court of errors, from which we extract the following: "A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. Bacon classes under the head of acts which are absolutely void, to all purposes, the bond of a *feme covert*, an infant, and a person *non compos mentis*, after an office found and bonds given for the performance of illegal acts. He considers a fraudulent gift void, as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and, therefore, in a legal sense, is not utterly void but merely voidable. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one: 2 Leo. 218; Viner, tit. 'Void and Voidable,' A. pl. 11. Again, a thing may be void in several degrees: 1. Void, so as if never done, to all purposes, so as all persons may take advantage thereof; 2. Void to some purposes only; 3. So void by operation of law, that he who will have the benefit of it, may make it good": *Anderson v. Roberts*, 18 Johns. 516, 527, 9 Am. Dec. 235.

Contracts to defraud creditors, those made under duress or while one of the parties was intoxicated and the like are not void but voidable at the option of the injured party, while contracts to do acts forbidden by law, such as the commission of crimes, or not to do acts required by

law, such as refusing to obey a subpoena, are utterly void. So are contracts of insane persons, "made after an inquisition and confirmation thereof, but not when made before office found, even if within the period overreached by the finding of the jury, although they are presumed to be so until capacity to contract is shown by satisfactory evidence:" *Hughes v. Jones*, 116 N. Y. 67, 73, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 637.

In *Van Deusen v. Sweet*, 51 N. Y. 378, relied on by the plaintiff, the headnote is misleading, for the learned judge writing the opinion used the word "void" with a flexible emaning, as on page 384 he says that the deed then in question "was not merely voidable, but absolutely void," and in the third sentence following that "it would have been competent for the plaintiff to have shown that the deed was voidable, if that had been necessary to defeat the defendant's claim: See *Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 N. Y. 107." It is evident from reading the entire opinion that the court had in mind the remedy of the plaintiff at law when it used the former expression, and the rights of the parties in equity when it used the latter. This case has produced some confusion, because, owing to the syllabus, it has been misunderstood.

In *Goodyear v. Adams*, 119 N. Y. 650, 23 N. E. 1149, 5 N. Y. Supp. 275, also relied on by the plaintiff, it was held that a deed executed by an insane person is absolutely void at law, but if taken in good faith and for a valuable consideration may be upheld in equity.

The question before us is not whether the deed is void at law, but whether it is void in the extreme sense of the word, not only at law but in equity, so that there was nothing for ratification to act upon. One of the defenses pleaded by the defendant Schwarz is of an equitable nature, as she alleged the payment of a consideration of seventy-eight thousand dollars and that fifty-four thousand dollars of that amount was applied upon the mortgages on the property which were satisfied of record.

I think the true rule was suggested by the great English commentator, when he said that "Idiots and persons of nonsane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable but not actually void": 2 Blac. Commentaries, 291.

Chancellor Kent uses similar language (2 Kent's Commentaries, 451); and other writers lay down substantially the same rule. Mr. Wharton, after a full discussion of the subject, says that "the true rule is that a voidable deed is capable of ratification, and if a grantor, when

insane, makes a deed, and should afterward in a lucid interval, well understanding the nature of the instrument, ratify and adopt it as his deed, as by receiving the purchase money due under it, this would give effect to it and render it valid in the hands of the grantee." The learned author cites many authorities in support of this position: 1 Wharton's Law of Contracts, sec. 107, p. 138.

In Bishop on Contracts (sections 873 and 874) it is said: "Plainly, in justice, the same party ought ordinarily to be holden, whether he knew of the insanity or not, if the other or his representative so elects. The authorities on this point may be conflicting, but such is believed to be the better doctrine. This last would make the contract voidable, whatever the courts should hold its other consequences to be. * * *

In general, this contract, like an infant's, may be ratified or disaffirmed by the insane party's guardian or committee, or by himself during a lucid interval or on becoming sane, or after his death by his proper legal representative." * * *

We will close our quotations with the following from Pollock's Principles of Contract, page 81: "The contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is not void, but only voidable at his option; and this only if his state is known to the other party": See, also, Shelford on Lunacy, 419; Story's Equity Jurisprudence, 228, 28 Am. & Eng. Ency. of Law, 1st ed., 478; 9 Am. & Eng. Ency. of Law, 2d ed., 119; Addison on Contracts, 6th ed., 1033; Smith on Contracts, 5th ed., 343, 344.

Although the decisions of the courts upon the subject are not uniform according to the weight of authority in this state, as well as elsewhere, the deed of a lunatic before office found is voidable only and not void. (Citing many cases). * * *

We think the rule laid down by these cases is sound and in the interest of those afflicted with diseases of the mind. The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect until the option to declare it void is exercised. The right of election implies the right to ratify, and it may be greatly to the advantage of the insane person to have that right. If the deed or contract is void, it binds neither party, and neither can derive any benefit therefrom, but if voidable, the lunatic, upon recovering his reason, can hold on to the bargain if it is good and let go if it is bad. This option is valuable, for it gives him the power to do as he wishes, and to bind or loose the other party at will. Upon the record before us, therefore,

even if the plaintiff was insane at the date of the deed, there was no error in directing a verdict for the defendants. * * *

HOVEY v. HOBSON.

53 *Maine*, 451; 89 *Am. Dec.* 705. (1866)

APPLETON, C. J. On July 27, 1835, Stephen Neal, then owning the land in controversy, conveyed the same to Samuel E. Crocker, from whom the tenant, by various *mesne* conveyances, derives his title.

On December 28, 1836, Stephen Neal died, leaving Lydia Dennett, then wife of Oliver Dennett, his sole heiress at law. On December 18, 1851, Oliver Dennett died.

On July 15, 1858, Lydia Dennett conveyed the demanded premises to the plaintiff.

The plaintiff introduced evidence tending to show that Stephen Neal at the date of his deed to Crocker was insane, and claimed to avoid said deed by reason of such insanity.

After the testimony reported had been introduced, the presiding justice ruled "that if Samuel E. Crocker, without fraud, for an adequate consideration, purchased the land of Stephen Neal, and afterwards said Crocker and those claiming under him conveyed said land in good faith until it came into the hands of the tenant for a valuable consideration, without any knowledge on his part of any defect in the title, or of any right or claim of any other person therein, then Mrs. Dennett, or those claiming under her, could not avoid her father's deed as against the defendant on the ground of his unsoundness of mind; and that the tenant would be entitled to a verdict."

If Crocker, "without fraud, for an adequate consideration, purchased the land of Stephen Neal," Neal being sane, his grantees would undoubtedly acquire a good title. The ruling is, that if insane the same result would follow, the grantees of Crocker being *bona fide* purchasers, and ignorant of the insanity of Neal. The questions therefore arise: 1. As to the rights of an insane man when restored to sanity, or of his heirs, to avoid, as against his immediate grantee, his deed executed and delivered when insane; and 2. As to the rights of those deriving a title in good faith without notice and for a valid consideration from such grantee. * * *

2. It is insisted, even if the deed of Neal might have been avoided

as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the idiotic will be materially diminished if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

'The acts of lunatics and infants are treated as analogous, and subject to the same rules: *Key v. Davis*, 1 Md. 32; *Hume v. Burton*, 1 Ridg. Pl. 77. "The grants of infants and persons *non compos* are parallel both in law and reason." *Thompson v. Leach*, 3 Mod 310.

The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found, and recover his land. "It may be objected," observes Marshall, J., in *Myers v. Sanders*, 7 Dana, 524, "that these restrictions upon the right of an adult to avoid his deed obtained by fraud are inconsistent with the principle which allows an infant to avoid his deed into whose hands soever the bill may have passed, and without regard to time, except as a statutory bar running after he becomes of age. But, waiving the inquiry how far the mere acquiescence of an infant grantee, after he becomes of age, may determine his right of revoking his title from the hands of a purchaser for value, who has acquired it after such acquiescence, we think the analogy between the cases is too slight to have any decisive influence upon the present question. The right of an infant to avoid his deed is an absolute uncontrollable privilege, founded upon an incapacity conclusively fixed by the law to bind himself absolutely by deed, or to pass an indefeasible title. These principles are irreversibly fixed by the law, and it enforces them without inquiring into particular circumstances, and without regard to consequences. It must do so in order to maintain them. The right of an adult grantor to avoid his deed for fraud stands upon an entirely different basis. It grows out of the particular circumstances; it is founded in a regard to justice between man and man; it is given as a remedy for the hardship of his case. In its very foundation and essence it is limited by the justice which is due to others, and therefore cannot be exercised without a regard to their rights and interests.

"But again, infancy is not, like fraud, a circumstance wholly extraneous from the title. The deed shows who the grantee is; the purchaser knows that an infant grantee cannot pass an indefeasible title;

he is bound to know the identity of the person who assumes to convey the title; and it is not an unreasonable requisition that he shall know whether the grantee under whom he claims title is under incapacity or not. In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law until the title has been confirmed by the matured consent of the grantor." In *Bool v. Mix*, 17 Wend. 119 (131 Am. Dec. 258), the suit was against one claiming by a title derived from the grantee of the minor, but the ground was not taken that in consequence thereof the tenant had an indefeasible title. The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title,—and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee whose title is thus derived must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The rights of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers, from the grantee; 1 Am. Lead. Cas. 259.

Note: There is an extended note on Contracts of Insane Persons, 71 Am. St. Rep. 425.

CHAPTER XXXIV.

MORTGAGES.

- Section 1. Legal and Equitable Theories.
- Section 2. Interest Subject to Mortgage.
- Section 3. Absolute Deed as a Mortgage.
- Section 4. Sale with a Right to Repurchase.
- Section 5. Conveyance by Deed in Trust.
- Section 6. Obligations Secured.
- Section 7. Liability of Mortgagor.
- Section 8. Mortgagor as Surety.
- Section 9. Payment or Tender.
- Section 10. Unauthorized Satisfaction of Mortgage.
- Section 11. Foreclosure.
- Section 12. Sale Without Foreclosure.

SEC. 1. LEGAL AND EQUITABLE THEORIES.

JAMIESON v. BRUCE.

6 Gill & Johnson, 72; 26 Am. Dec. 557. (1834)

ARCHER, J. The point in controversy in this cause involves the consideration of the relative rights of mortgagor and mortgagee, before forfeiture, and in a case where the mortgage contains no covenant or agreement that the mortgagor shall retain possession of the property mortgaged.

The mortgagor seeks to make the mortgagee, obtaining peaceable possession of the mortgaged property before forfeiture, a trespasser.

This is not a case in which there is any express covenant, that the mortgagor shall continue in possession until there is a default in payment, nor is it a case in which, by fair inference, or necessary implication from the instrument, the conclusion can be drawn, that the mortgagor was quietly to enjoy the mortgaged property, but on the contrary, the instrument is wholly silent on the subject. The parties, therefore, must stand upon their legal rights, according to the terms used in the conveyance.

Courts of equity consider a mortgage as a mere security for money. But this is not the light in which it is viewed in courts of law, which, as Mr. Justice Bailey observes, in 1 Dowl. and Ry. 273, generally know nothing about mortgagor and mortgagee. They look solely to the estate conveyed by the instrument, and consider the mortgagor in possession, unless, under the circumstances above mentioned, as the mortgagee's tenant, and strictly within the definition of a tenant at will; not, to be sure, entitled to all the privileges of a tenant at will, or answerable for the burdens of such an estate, but liable to have his possession defeated in the same manner. Upon the execution of the mortgage, the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly permitted until the will of the mortgagee is determined.

It is said in 1 Pow. Mort. 171, that as soon as an estate in mortgage is created, the mortgagee may enter into possession, but as the payment of interest is the principal object of the mortgagee, he seldom avails himself of that right, unless obliged so to do, to secure the payment of the interest, or with a view to compel the repayment of the money. This right of possession is always subject to any agreements which may be made in relation thereto, and mortgages do generally contain clauses giving the right of possession as against the mortgagee until forfeiture; but where the parties are entirely silent as regards the possession, the right thereto follows the legal estate, and vests in the mortgagee.

The above doctrine appears also generally to correspond with the decisions in the different states, although there is certainly some conflict of authority.

It is said in 2 Mass. 43, that after the creation of the estate upon condition, the mortgagee has presently the same right to enter *in pais* and take the profits, or by judgment and execution in a writ of entry, that he would have if the estate were absolute, subject to account for the profits if the mortgagor perform the condition or redeem. In New Hampshire, Maine and Pennsylvania, the same doctrines appear to prevail, and in 4 Rand. 248, it is said that a mortgagee is entitled to an estate as tenant in fee, or for a term of years, as the case may be, or to an absolute estate in personal property; as regards the title, subject to any agreement as to possession, and defeasible at law by the performance of the condition.

In New York, a different doctrine prevails, and a mortgagor may there maintain trespass against a mortgagee. Even the action of eject-

ment by a mortgagee is abolished, and the mortgagee is driven to rely upon a special contract for possession, if he wishes it, or to the remedy by foreclosure and sale.

Upon the whole, although there may be cases in which a court of law, as well as a court of equity, would treat the mortgagor as the substantial owner of the estate, yet we are satisfied that unless there be some agreement between the parties, the mortgagee is entitled to possession when he chooses to exercise the right.

This privilege appears to be essential to the protection of the property mortgaged, and without such right the security would in many cases be entirely fruitless.

RUNYAN v. MERSEREAU.

11 Johnson, 534; 6 Am. Dec. 393. (1814)

Trespass *quare clausum fregit*. The plaintiff was in possession of the *locus in quo*, and had purchased the equity of redemption thereof, under a judgment issued in his behalf against one Leonard. The latter had previously mortgaged the land to Mersereau, under whom the defendant entered and cut timber. The question was as to who had the freehold, the mortgagee or the plaintiff, the purchaser under the mortgagor.

By Court. This was an action of trespass *quare clausum fregit*. The plaintiff proved himself in possession of the *locus in quo*, and showed a title derived under a judgment against one James Leonard, who, it appeared, had mortgaged the land to Joshua Mersereau. By the pleadings, the question presented to the court is, whether the freehold was in the plaintiff who had purchased the equity of redemption under the judgment against the mortgagor, or in Joshua Mersereau, the mortgagee. Courts of law, both here and in England, have gone very far towards, if not the full length of, considering mortgages, at law as in equity, mere securities for money, and the mortgagee as having only a chattel interest. Lord Mansfield, Doug. 610, says a mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security; that it is an affront to common sense to say the mortgagor is not the real owner. Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguish-

ment of the mortgage. Mortgages will pass by a will not made with the solemnities of the statute of frauds. The assignment of the debt, or forgiving it even by parol, draws the land after it as a consequence. The debt is considered the principal, and the land as an incident only. The interest of the mortgagee cannot be sold under execution. It is unnecessary to go into an examination of the cases on this subject; they have been repeatedly reviewed by this court: 3 Johns. Cases, 429; 1 Id. 590; 4 Id. 42. The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he, of course, is entitled to judgment.

Judgment for the plaintiff.

SEC. 2. INTEREST SUBJECT TO MORTGAGE.

BUTT v. ELLETT.

19 Wall. (U. S.) 544; 22 L. Ed. 183. (1873)

Sillers, the owner of a plantation in Mississippi, leased the same, on the 15th of January, 1867, to Graham, for one year, from January 1st, of that year, Graham giving his own note, payable to Sillers, for \$3,500, for the rent. And to secure payment of the note embodying in the lease by which the plantation was let to him a mortgage of all the crops raised on the plantation in the year 1867. The mortgage was immediately recorded in due form. The note was never paid.

On the 3d of June, 1867, one Ellett, having recovered a judgment against Sillers, sold the plantation at a sheriff's sale under the judgment, and bought it; and Sillers transferred to him the note of Graham for \$3500, due November 1st, 1867, the rent to be paid.

Notwithstanding this, Graham, in November of 1867, transferred the whole crop to certain correspondents of his, Butt & Co., who were heavily in advance for him on then existing transactions. They sold the crop and applied the proceeds in account to the payment of Graham's debt to them.

Hereupon Ellett filed a bill in the court below against Butt & Co., to charge them, as trustees for him, with the proceeds of the crop.

The evidence showed;—

On the one hand, that planting never begins in Mississippi earlier than March; and,

On the other,

That on the 6th of February, 1867, the defendants had seen the lease with the mortgage provision in it, but apparently that they regarded the provision as void. It also showed that on learning that Graham had transferred the crop of 1867 to Butt & Co., Ellett immediately wrote to them, informing them that the lease with the mortgage in it had been at once duly recorded; that, besides, they had express notice of its existence, and that he would hold them accountable as trustees for the proceeds of the crop if they sold it.

The court below decreed in favor of the complainant, and the defendant brought the case here. * * *

MR. JUSTICE SWAYNE delivered the opinion of the court.

The mortgage clause in the contract of lease of the 15th of January, 1867, executed by Sillers and Graham, could not operate as a mortgage, because the crops to which it relates were not then in existence. When the crops grew, the lien attached and bound them effectually from that time.

It is admitted that the cotton in question was one of those crops.

Ellett having bought the premises became clothed with all the rights of Sillers, touching the rent stipulated to be paid by Graham. The sheriff's deed conveyed the reversion, and the rent followed it as an incident. The lease passed by assignment to the grantee, and all its provisions in favor of the lessor enured to the benefit of the assignee. The appellants had full notice of the rights of Sillers. They read the lease a few days after its execution. Ellett also notified them of his rights and claim. The cotton went impressed with his lien into their hands. When they sold it they took the proceeds in trust for his benefit, and became liable to him for the amount.

Decree affirmed.

PENNOCK et al. v. COE.

23 How. (U. S.) 117; 16 L. Ed. 436. (1859)

MR. JUSTICE NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the northern district of Ohio.

The bill was filed in the court below, by Coe, mortgagee of the road of the railroad company, in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company, by Pennock and Hart, two of the defendants.

The facts of the case are these: The Cleveland, Zanesville, and Cincinnati Railroad Co., created a body politic and corporate by the laws of Ohio, to make a railroad between certain termini in that State, in pursuance of authority conferred by law, issued bonds to the amount of \$500,000, payable ten years from date, with interest at the rate of seven per cent, payable semi-annually, on the first day of April and October, in each year, and, to secure the payment of the same, executed a mortgage of the railroad and its equipments to the complainant, in trust for the bondholders, the description of which is in the words following: "All the present and future to be acquired property of the parties of the first part; that is to say, their road, made or to be made, including the right of way, and the land occupied thereby, together with the superstructure and tracts thereon, and all rails and other materials used therein, or procured therefor, with the above-described bonds, or the money obtained therefor, bridges, viaducts, culverts, fences, depots, grounds and buildings thereon, engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income, to be had or levied therefrom, and all franchises, rights and privileges, of the parties of the first part, in, to, or concerning the same." At the time of the issuing of these bonds, and the execution of the mortgage, the railroad was in the course of construction, but only a small portion of it finished. It was constructed and equipped almost entirely by means of the funds raised from these bonds, together with a second issue to the amount of \$700,000. The road cost upwards of \$1,500,000. The stock subscribed and paid in, amounted only to some \$369,000.

The mortgage securing the payment of the second issue bears date the first of November, 1854, and was made to one George Mygatt, in trust for the bondholders, and the property described in and covered by it is the same as that described in the first mortgage. The road was finished to Millersburg, its present terminus south, in May, 1854, and the whole of the rolling stock was placed on it previous to the date of the second mortgage. This stock was purchased and placed on the road from time to time, as the locomotives and cars were needed in the progress of its construction.

The mortgage to the complainant contained a covenant on the part of the company, that the money borrowed for the construction and

equipment of the road should be faithfully applied to that object, and that the work should be carried on with due diligence until the same should be finished.

In case of default in the payment of the principal or interest of the bonds, the trustee was empowered to enter upon and take possession of the road, or, at the election of a moiety of the bondholders, to sell the same at public auction, and apply the proceeds to the payment of the bonds.

The defendants, Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same, May, 1856, against the railroad company, issued execution, and levied on a portion of the rolling stock of the road, and caused the same to be advertised for sale.

This bill was filed to enjoin the sale, and a decree was rendered perpetually enjoining it in the court below, which is now before us on appeal.

The first two grounds of objection taken to this decree may be considered together. They are: 1, that the mortgage to the trustee of the 1st April, 1852, is void or inoperative, as respects the locomotives and cars which were levied on under the execution of the defendants, inasmuch as they were not in existence at the date of it, but were constructed and placed on the road afterwards, being subsequently acquired property of the company. And, 2, that the mortgage is void, on the ground of uncertainty as to the property described or attempted to be described therein and conveyed to the mortgagee. The description begins by conveying "all the following present and future acquired property of the said parties of the first part;" and after specifying the road and the several parts of it, together with the rolling stock, there is added, "and all other personal property, right thereto, and interest therein." This clause, probably, from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and, if so, the better opinion, perhaps is, that it would be bound by the mortgage even as against judgment creditors.

But it is unimportant to express any opinion upon the question, as the property in this case (the locomotives and cars) levied on are articles specifically enumerated; and the only uncertainty existing in respect to them arises out of their non-existence at the date of the mortgage. An uncertainty of this character need not be separately examined, as it will be resolved by a consideration of the first question, which is, whether or not the after-acquired rolling stock of the com-

pany placed upon the road attaches, in equity, to the mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company?

If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders, (for the mortgagee represents them,) that if they will advance their money to build the road, and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract, when stripped of form and verbiage; and, in order to carry out this intent most effectually, and with as little hazard as possible to the lender, the company especially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfilment of the intent, the company agrees, that in case of default in the payment of principal or interest, the bondholders may enter upon and take possession of the road, and run it themselves, by their agents, applying the net proceeds to the payment of the debt.

The bondholders have fulfilled their part of the agreement, they have advanced the money on the faith of the security; the company have also fulfilled theirs—they have made the road and equipped it; it has been partially in operation since January, 1852, and in operation upon the whole line since May, 1854. The road, therefore, as described in the mortgage, from Hudson to Millersburg, and which was in the course of construction at the date of the instrument, has been finished, and the rolling stock, locomotives, tenders, and cars, also described in it, and which were to be afterwards acquired, have been brought into existence, and placed upon it—all in conformity with the agreement of the parties; and the question is, whether there is any rule of law or principle of equity that denies effect to such an agreement.

The main argument urged against it is founded upon the maxim, that "a person cannot grant a thing which he has not:" *ille non habet, non dat*; and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may, at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, *in presenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity.

But the principle has no application to the case before us. The mortgage here does not undertake to grant, *in presenti*, property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired. Portions of the road had been acquired and finished, and were in operation, when the mortgage was given, upon which it is conceded it took effect; other portions were acquired afterwards and especially the iron and other fixtures, besides the greater part of the rolling stock.

The terms of the grant or conveyance are: "all present and future to be acquired property of the parties of the first part;" that is to say, "their road, made or to be made, and all rails and other materials, &c., including iron rails and equipments, procured or to be procured," &c. We have no occasion, therefore, of calling in question, much less denying, the soundness of the maxim, so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is, not whether a person can grant *in presenti* property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfillment of an express agreement, founded on a good and valuable consideration; and this, when no rule of law is infringed or rights of a third party prejudiced? The locomotives and cars were all placed upon the road as early as February, 1854, when, at the furthest, the mortgage attached to those in question, according to its terms, if at all, and the judgment of the defendants was not recovered till May, 1856.

We think it very clear, if the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely, the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance. One of the covenants was, that the money should be faithfully applied to the building and equipment of the road; or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, and this in order to protect the security of the bondholders. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the vol-

untary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence.

The case of *Langton v. Hasten* (1 Hare's Ch. R., 549) supports this view. The mortgage security in that case was the assignment of the ship *Foxhound*, then on her voyage to the South seas, together with all and singular her masts, &c., "and all oil and head matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present voyage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the moneys advanced and that the complainants be entitled to the benefit of the security, in preference to the judgment creditor.

The vice chancellor, in giving his opinion, observed: "Is it true that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract?"

And, in answer to the question, he said: "It is impossible to doubt, for some purposes at least, that by contract an interest in a thing not in existence at the time of the contract may, in equity, become the property of the purchaser for value." And, after reviewing the cases in the books, he concludes: "I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that Bixnie the contracting party, would be bound by the assignment to the plaintiffs."

There are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day. (2 Selden R., 179; 3 Green Ch. R., 377; 32 N. H. Rep., 484; 25 Barb., 286; *ib.*, 284; 18 B. Munro, 431; Redfield on Railways, 590, and note; 2 Story R., 630; 7 Jurist, 771; *Tapfield v. Hillman*.)

In the case of *Tapfield v. Hillman*, Tindall, Ch. J., seems inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it, if the terms indicated an intent to comprehend them.

The counsel for the appellee referred to the case of *Chapman v. Weimer & Steinbacker* (4 Ohio R., 481), as denying effect to a mortgage upon after-acquired property. But that was a case at law; and even there the court held that the mortgage attached after the property was acquired, from the time the right was asserted by the mortgagee.

In conclusion upon this point, we are satisfied that the mortgage at-

tached to the future acquisitions, as described in it, from the time they came into existence. As to the claim of the judgment creditors, there are several answers to it.

In the first place, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of the bonds. It is true, if the property covered by the mortgage constituted a fund more than sufficient to pay their demands, the court might compel the prior encumbrancer to satisfy the execution, or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to enable the judgment creditor to reach the surplus. Or the court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it. But no such ground has been presented, or could be sustained upon the facts before us. On the contrary, it cannot be denied but that the whole of the property mortgaged, is insufficient to satisfy the bondholders under the first mortgage, much less when those under the second are included. To permit any interference, therefore, on the part of the judgment creditors, with a view to the satisfaction of their debt, consistent with the superior equity of the bondholders, would work only inconveniences and harm to the latter, without any benefit to the former. (3 Hare's Ch. R., 416; 9 Georgia R., 377; Redfield on Railw., 506; 5 Ohio R., 92.)

In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders *pro rata*. The payment of the bonds of the second issue are also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien.

As the judgment creditors can have no interest in the management

or disposition of the property, except as bondholders on account of the deficiency of the fund, it is unimportant to inquire whether or not the court was right in refusing a receiver, or to direct a sale of the road with a view to a distribution of the proceeds. For aught that appears, the road has been managed, under its present directors, with prudence and fidelity, and to the satisfaction of the bondholders, the parties exclusively interested.

Another objection taken to the validity of the mortgage is the want of power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose. There is certainly some obscurity in the statutes creating this corporation as to the extent of the line of its road; but we agree with the court below, that, upon a reasonable interpretation of them, the power is to be found in their charter. They were authorized to construct the road from some convenient point on the Cleveland and Pittsburgh road, in Hudson, Summit county, through Cuyahoga Falls, and Akron, to Wooster, or some point on the Ohio and Pennsylvania railroad, between Massillon and Wooster, and to connect with said Ohio and Pennsylvania road, and any other railroad running in the direction of Columbus. It was clearly not limited, in its southern terminus, to its connection with the Ohio and Pennsylvania road, for there is added, "and any other railroad running in the direction of Columbus." The extension of the road to the Ohio Central road at Zanesville, or at some other point on this road, comes fairly within the description.

We have not referred particularly to the authority of the company, under the statute laws of Ohio, to borrow money and pledge the road for the security of the payment, as no such question is presented in the brief or was made on the argument. Indeed, the authority seems to be full and explicit.

Decree below affirmed.

SEC. 3. ABSOLUTE DEED AS A MORTGAGE.

WALLACE v. SMITH.

155 Pa. St., 78; 35 Am. St. Rep. 869; 25 Atl. 807. (1892)

* * * STERRETT, J. This case originated in transactions between the plaintiff and John Rynd, one of the defendants, prior to June 3, 1881, and hence it is not affected by provisions of the act approved on that day. Nothing was then better settled by a long line of decisions than that a conveyance of land, intended to operate merely as a security for money, was, in effect, a mortgage, not only as between the parties themselves, but also as to those who had notice of the transaction: Guthrie v. Kahle, 46 Pa. St. 331; McClurkan v. Thompson, 69 Pa. St. 305. The reason why such a deed, absolute on its face, might be treated in equity as a mortgage, was because it would be a fraud on the part of the grantee, for example, to hold and use, as indefeasible, an instrument which was delivered to and accepted by him as a defeasible instrument or mortgage. The plaintiff in such cases, seeking to reform the instrument, must invoke the equity power of the court, and upon that he must stand or fall. The burden of proof is upon him, and it is only upon clear, precise, and indubitable evidence of the fact that the deed was intended by both parties thereto to operate only as a mortgage that he can succeed in having it so declared by a chancellor: Rowand v. Finney, 96 Pa. St. 192; Hartley's Appeal, 103 Pa. St. 23. If the party setting up the defeasance is able to prove the fact by evidence that is not only clear and precise, but at the same time carries with it a conviction of its truth, he is entitled to succeed, notwithstanding there may be rebutting testimony tending to prove the contrary. Full credence may be given to the testimony on one side, while that on the other may be rejected as unworthy of belief, or, at best, insufficient to create even a serious doubt: Hartley's Appeal, 103 Pa. St. 23. As was said by our late brother Clerk: "Each case must, of course, to a great extent depend upon the circumstances peculiar to itself; but there are certain *indicia* of intention which frequently occur, and, when they do exist, are always looked to. Among these are the sufficiency of the price paid; whether or not existing securities or evidences of indebtedness were given up or canceled; whether there was any obligation to repay the purchase money, and whether the grantee entered into immediate possession," etc.: Huoncker v. Merkey, 102 Pa. St. 462, and authorities there cited.

One of the tests by which to determine whether the conveyance of land in consideration of grantor's indebtedness to grantee is to be deemed an absolute sale or a mortgage is the effect which the parties intend the conveyance shall have on the indebtedness itself. In 1 Jones on Mortgages, section 267, the subject is discussed thus: "If the indebtedness be not canceled equity will regard the conveyance as a mortgage, whether the grantee has so regarded it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, * * * is to be found in the question whether the debt was discharged or not by the conveyance." To the same effect is *Null v. Fries*, 110 Pa. St. 521, in which it was held that an absolute conveyance, in consideration of grantor's indebtedness, etc., may be shown to have been a mortgage if the debt survived. If, however (as in that case), the judgments and securities which constituted the consideration for the conveyance are satisfied and canceled, the mere fact that the grantee executed articles of agreement giving the grantor an option to repurchase the property within a certain time will not make the transaction a mortgage.

The substance of the bill and answer and the principal facts of the case sufficiently appear in the report and supplemental report of the learned master. It is therefore unnecessary to restate them here. His inferences of fact and conclusions of law being in favor of plaintiff, he accordingly recommended a decree substantially as prayed for. Sixteen exceptions to the report were filed by defendants. These were fully heard by the learned court, who, upon consideration thereof, sustained five of them, and dismissed the bill, with costs to be paid by plaintiff. The exceptions thus sustained are fully recited in the second to sixth specifications inclusive. In substance, they are to the effect that the case upon the pleadings and the proofs, was insufficient to warrant the master in finding that the deed in question was intended by the parties thereto to operate as a mortgage, and in so treating it in the decree he recommended. After an examination of the record, including the pleadings and the testimony, and due consideration of the same in the light of the principles applicable to such cases, especially the character and degree of the proof required, we are constrained to the same conclusion that was reached by the learned court below. While there are some *indicia* of an intention to consider the deed in question as merely security for the money advanced by Rynd, one of the defendants, to pay plaintiff's mortgage debt to the Dollar Savings Bank, the proof is not of that clear, precise, and convincing

character that is required to move the conscience of a chancellor to reform a deed, absolute on its face, and declare by his decree that the parties thereto intended that it should operate merely as a mortgage. Referring to Rynd's assumption and payment of said mortgage debt, amounting, with interest, to nearly four thousand four hundred dollars, plaintiff was asked whether he then or thereafter gave Rynd any obligation or written evidence of indebtedness for the amount thus advanced or for other money, and his reply was, "No, not that I remember."

The substance of plaintiff's testimony as to his understanding at the time the land was conveyed to Rynd is, that the latter would reconvey the same "at any time I could see my way clear to give back his money"; "that was the only promise that was made." In slightly varied forms of expression he repeated this several times. His wife's testimony was to the same effect. In his affidavit of defense, filed in No. 141, October term, 1891, he stated the arrangement thus: "If said affiant should elect to redeem said realty at any time, that affiant would have the privilege or right so to do, by repaying the amount he, affiant, would owe the said John Rynd. That on the.....day of May, 1890, affiant elected to redeem said realty, and tendered a certain sum of money for that purpose to both Rynd and Smith."

It is even more than doubtful whether ever such election would have been attempted or tender made if it had not been for the advance in prices of land in the neighborhood, stimulated by developments for oil purposes. It does not appear that, during the more than nine years preceding, plaintiff had ever seen his "way clear" to give back to Rynd the money he paid or advanced in consideration of the conveyance in April, 1880. Nor does it appear that he was ever under any obligation to repay the same, however clearly he might have seen his way to do so. On the theory of indebtedness, the amount which Rynd would have been entitled to receive when suit was brought, including money advanced to pay the mortgage, the judgment, etc., with interest would be nearly ten thousand dollars.

When Mr. Smith accepted the trust under Mr. Rynd's deed of May 18, 1885, and assumed charge of the farm, plaintiff never suggested that he had any interest therein, or any right to redeem the same; nor did he ever intimate anything of the kind for nearly five years thereafter. On the contrary, after the death of his mother, in 1888, for whom the provision was made in the trust deed, plaintiff leased the farm from the trustee, and at one time spoke of buying it. It was not until shortly before this suit was brought, in 1890, that the

trustee received any intimation of plaintiff's claim, either from him or from any other source. Plaintiff's equity, if he ever had any, is very stale.

There are other facts and circumstances tending to cast doubt on plaintiff's claim, but it is unnecessary to specify them. It is sufficient to say that his contention is not sustained by that clear, precise, and indubitable proof which alone should move a chancellor to declare by his decree that the deed in question was intended by the parties thereto to operate merely as security for the money advanced. We therefore think there was no error in sustaining the five exceptions referred to, and in dismissing the bill at plaintiff's costs.

Decree affirmed, and appeal dismissed, with costs, including costs in the court below, to be paid by appellant.

PEUGH v. DAVIS.

96 U. S. 335; 24 L. Ed. 775. (1877)

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity to redeem certain property, consisting of two squares of land in the city of Washington, from an alleged mortgage of the complainant. The facts, out of which it arises, are briefly these: In March, 1857, the complainant, Samuel A. Peugh, borrowed from the defendant, Henry S. Davis, the sum of \$2,000, payable in sixty days, with interest at the rate of three and three-fourths per cent a month, and executed as security for its payment a deed of the two squares. This deed was absolute in form, purporting to be made upon a sale of the property for the consideration of the \$2,000, and contained a special covenant against the acts of the grantor and parties claiming under him. This loan was paid at its maturity, and the deed returned to the grantor.

In May following, the complainant borrowed another sum from the defendant, amounting to \$1,500, payable in sixty days, with the same rate of interest, and as security for its payment redelivered to him the same deed. Upon this sum the interest was paid up to the 6th of September following. The principal not being paid, the defendant placed the deed on record on the 7th of that month. In January, 1858, a party claiming the squares under a tax title brought two suits in ejectment for their recovery. The defendant thereupon demanded

payment of his loan, as he had previously done, but without success.

On the 9th of February following, the complainant obtained from the defendant the further sum of \$500, and thereupon executed to him an instrument under seal, which recited that he had previously sold and conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee-simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties, and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for \$2,000, purporting to be in full for the purchase of the land.

The question presented for determination is whether these instruments, taken in connection with the testimony of the parties, had the effect of releasing the complainant's equity of redemption. It is insisted by him that the \$500 advanced at the time was an additional loan, and that the redelivered deed was security for the \$2,000, as it had previously been for the \$1,500. It is claimed by the defendant that this money was paid for a release of the equity of redemption which the complainant offered to sell for that sum, and at the same time to warrant the title of the property and indemnify the defendant against loss from the then pending litigation.

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent

fraud or oppression, and to promote justice. *Hughes v. Edwards*, 9 Wheat. 489; *Russell v. Southard*, 12 How. 139; *Taylor v. Luther*, 2 Sumn. 228; *Pierce v. Robinson*, 13 Cal. 116.

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower. *Russell v. Southard*, *supra*. Without citing the authorities, it may be stated as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity of redemption was ever released. The testimony of the parties is directly in conflict, both being equally positive,—the one, that the advance of \$500 in February, 1858, was an additional loan; and the

other, that it was made in purchase of the mortgagor's interest in the property. The testimony of the defendant with reference to other matters connected with the loan is, in several essential particulars, successfully contradicted. His denial of having received the instalments of interest prior to September, 1857, and his hesitation when paid checks for the amounts with his indorsement were produced, show that his recollection cannot always be trusted.

Aside from the defective recollection of the creditor, there are several circumstances tending to support the statement of the mortgagor. One of them is that the value of the property at the time of the alleged release was greatly in excess of the amount previously secured with the additional \$500. Several witnesses resident at the time in Washington, dealers in real property, and familiar with that in controversy and similar property in its vicinity, place its value at treble that amount. Some of them place a still higher estimate upon it. It is not in accordance with the usual course of parties, when no fraud is practiced upon them, and they are free in their action, to surrender their interest in property at a price so manifestly inadequate. The tax title existed when the deed was executed, and it was not then considered of any validity. The experienced searcher who examined the records pronounced it worthless, and so it subsequently proved.

Another circumstance corroborative of the statement of the mortgagor is, that he retained possession of the property after the time of the alleged release, enclosed it, and either cultivated it or let it for cultivation, until the enclosure was destroyed by soldiers at the commencement of the war in 1861. Subsequently he leased one of the squares, and the tenant erected a building upon it. The defendant did not enter into possession until 1865. These acts of the mortgagor justify the conclusion that he never supposed that his interest in the property was gone, whatever the mortgagee may have thought. Parties do not usually enclose and cultivate property in which they have no interest.

The instrument executed on the 9th of February, 1858, and the accompanying receipt, upon which the defendant chiefly relies, do not change the original character of the transaction. That instrument contains only a general warranty of the title conveyed by the original deed, with a special covenant to indemnify the grantee against loss from the then pending litigation. It recites that the deed was executed upon a contract of sale contrary to the admitted fact that it was given as security for a loan. The receipt of the \$2,000, purporting to be the purchase-money for the premises, is to be construed with the instru-

ment, and taken as having reference to the consideration upon which the deed had been executed. That being absolute in terms, purporting on its face to be made upon a sale of the property, the other papers referring to it were drawn so as to conform with those terms. They are no more conclusive of any actual sale of the mortgagor's interest than the original deed. The absence in the instrument of a formal transfer of that interest leads to the conclusion that no such transfer was intended.

We are of opinion that the complainant never conveyed his interest in the property in controversy except as security for the loan, and that his deed is a subsisting security. He has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him.

The decree of the Supreme Court of the District must be reversed, and the cause remanded for further proceedings, in accordance with this opinion, and it is

So ordered.

SEC. 4. SALE WITH A RIGHT TO REPURCHASE.

CONWAY'S EXECUTORS AND DEVISEES v. ALEXANDER.

7 Cranch (U. S.) 218; 3 L. Ed. 321. (1812)

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe,

Robert Muire, and John Allison, of the third part. Robert Alexander, after reciting that he was seised of an undivided moiety of four hundred acres of land, except forty acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains, and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire, and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the 1st of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of seven hundred pounds, with interest from the said 20th of March, 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of seven hundred pounds, with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a conveyance to him the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of seven hundred pounds; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurance as to the one hundred and forty acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of seven hundred pounds, conveyed the said land in fee to William Lyles. On the 23d of August, 1790, William Lyles, in consideration of nine hundred pounds, conveyed the said twenty acres of land, and one hundred and forty acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land.

Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles.

The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is, whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of seven hundred pounds, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month; or is to be considered as having only mortgaged the property so conveyed.

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended; but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law, for the recovery of the money, certainly could not have been sus-

tained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the seven hundred pounds, on the day fixed for its payment, which should be absolute in its form. This intention; however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as at least possible that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage. It is certain that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage.

The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction, respecting a loan or mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance the court attaches much importance. Had there been any treaty, any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale, and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete, that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat.

His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan; and the evidence in the cause furnished strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustee would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage, he would naturally have resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander

is far from being unimportant. That he mentions forty acres, sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional, implies an expectation to redeem.

A conditional sale made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges furnish irresistible proof that a sale could not have been intended. If lands were sold at five pounds per acre conditionally, which, in fact, were worth fifteen or twenty pounds, or fifty pounds per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighbourhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide.

That twenty acres, part of the tract, were sold absolutely for five pounds per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully;

that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court, that the decree of the circuit court is erroneous, and ought to be reversed and that the cause be remanded to that court with directions to dismiss the bill.

Decree reversed.

SEC. 5. CONVEYANCE BY DEED IN TRUST.

SHILLABER v. ROBINSON.

97 U. S. 69; 24 L. Ed. 967. (1877)

The original transaction, which gave rise to the present suit, was a sale by John Shillaber of about three thousand acres of land, in the State of Illinois, to John Robinson, the appellee. The contract was evidenced by a written agreement, by which it appears that Robinson, in part payment of the Illinois land, was to convey to Shillaber three different parcels of land, lying in the State of New York,—one in Kings, one in Sullivan and one in Essex Counties.

On this contract, a suit, in the nature of a bill for specific performance, was brought, in the Circuit Court of Ogle County, Illinois, by Robinson against Shillaber. The latter having subsequently died, his sole heir, Theodore Shillaber, was substituted as defendant. The suit resulted in a decree which, among other things, established an indebtedness of Shillaber to Robinson, on final accounting, of \$4,249.58; and ordered that, on the payment of this sum, Robinson should convey to Shillaber the lands in New York, already mentioned. In order that the whole matter should be finally disposed of, the decree then ordered that Robinson and wife should make and deposit with the clerk of the court a good and sufficient conveyance for said lands, as an escrow, to be delivered to Shillaber on his payment of the sum aforesaid within ninety days. It further provided that, if the money was not paid by Shillaber within that time, Robinson should convey the lands, in trust, to Silas Noble, who "should proceed to sell the same, in such manner, and after giving such reasonable notice of the time

and place of such sale, as might be usual or provided by law in the State of New York;" and out of the proceeds pay the expenses of the trust and the money due Robinson, with interest, and hold the remainder, if any, subject to the order of the court.

Shillaber did not pay the money as ordered by the decree. Robinson then made the deed of trust to Noble, in strict accordance with the terms of the decree; and Noble, after giving notice of sale, by publication once a week for six weeks successively in the "Brooklyn Standard," sold, at public auction, on the sixteenth day of March, 1861, the lands to John A. Robinson, for the sum of \$1,950, and made to him a conveyance of the same. Said John A. Robinson purchased the lands for the benefit of John Robinson. Neither the deed from John Robinson to Noble, nor that from the latter to John A. Robinson was placed upon record.

Since that time, and before the commencement of the present suit, John Robinson sold all these lands to divers and sundry individuals, for sums amounting in the aggregate to \$9,628. * * *

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The principal, in fact the only, defence which merits any consideration in this case, is that by the trust-deed which Robinson made to Noble under the decree of the court, and by the sale which Noble made in conformity to the terms of the decree, and of that deed, Shillaber's rights were completely divested in the land; and since it did not bring, at that sale, as much money as was due to Robinson, which, by the terms of both the decree and the deed of trust, was to be paid to him out of the proceeds of that sale, nothing was left for Shillaber in the matter.

The decree in the Illinois suit, in which Theodore Shillaber had appeared after his father's death, is binding and conclusive on both parties. The deed of trust made by Robinson to Noble is in accordance with the decree, and conferred an authority on him to sell the land. The purpose of this sale, as expressed in the deed of trust and the decree, was to pay to Robinson the \$4,249.58, which was a first lien on the land, and the balance into the court, for the use of Shillaber.

Much discussion has been had in the case as to the nature of the conveyance to Noble, one party insisting that it is a simple mortgage with power of sale, and the other that it is, under the statutes of New York, the creation of a valid trust in lands. The point of this discussion is found in the question, whether the sale by Noble, under that instrument, was valid or was void. The counsel of defendant

insists that Noble became vested with a perfect title to the land by the deed of Robinson, and that his sale and conveyance are valid whether he pursued the direction of the deed in regard to advertising or not; and that, if any such advertising were necessary, there was no usual notice, nor any provided by law, for such sales in the State of New York.

It is shown by the evidence that Noble did publish a notice that the three pieces of land in the three different counties would be sold on a day mentioned, at Montague Hall, in the city of Brooklyn. This notice was published for six weeks preceding the day appointed for the sale, in the "Brooklyn Standard," a weekly paper printed in Kings County. But the statutes of New York, then in force, prescribed publication of such notice for twelve weeks successively before the sale.

If the instrument under which Noble acted is a mortgage with power of sale, it is beyond dispute that the sale is void, because it was not made in conformity with the terms on which alone he was authorized to sell. That the sale, under such circumstances, is void, is too well established to admit of controversy. We refer specially to the recent case in this court of *Bigler v. Waller*, 14 Wall 302. The list of authorities cited by the appellant are to the same effect.

Without entering into the argument of the question whether the instrument under which Noble acted is in all respects a mortgage, the case of *Lawrence v. The Farmers' Loan & Trust Co.* (13 N. Y. 200), shows that it is an instrument which for the purposes of the sale under the power which it contains, comes under the provisions of the statute we have cited as regards publication of notice. It also decides that a sale made without such notice is void. It is the well-settled doctrine of courts of equity, that a conveyance of land, for the purpose of securing payment of a sum of money, is a mortgage, if it leaves a right to redeem upon payment of the debt. If there is no power of sale, the equity of redemption remains until it is foreclosed by a suit in chancery, or by some other mode recognized by law. If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery. These instruments generally give specific directions regarding the notice to be given, and of the time, place, and terms of the sale. In some States, the statute prescribes the manner of giving this notice, and in such case it must be complied with. In either case, the validity

of the sale being wholly dependent on the power conferred by the instrument, a strict compliance with its terms is essential.

If this is not a mortgage to which the notice of the New York statute is applicable, we do not see that the defendant's position is improved by that circumstance; for there is, then, no provision for a sale or foreclosure of the equity of Shillaber, but by a decree of an equity court. This has never been had, and it still remains that there has been no valid execution of the trust reposed in Noble by the deed. If the matter had remained in this condition, Shillaber would, on payment to Robinson of the \$4,249.58, with interest, have had a right, enforceable in this suit, to have a conveyance of the New York land by Noble to him. But neither the conveyance by Robinson, which remained an escrow, nor that to Noble, was ever placed on record; and Robinson, in whom, according to the records of the proper counties in New York, the title still remained, sold all these lands to persons who, as innocent purchasers for a valuable consideration, now hold them by a good title. This title is equally beyond the reach of Robinson, of Shillaber, and of the court. Indeed, although Robinson alleges in his answer that the purchase of John A. Robinson was made for his benefit, he seems to have attached no importance to it; for he does not aver that John A. Robinson ever conveyed to him, nor does he, while giving copies of all the deeds on which he relies, including the deed to John A. Robinson, show any evidence of a conveyance from John A. Robinson to him.

The defendant, therefore, when he sold and conveyed this land to the parties who now hold it under him, did it in violation of the rights of Shillaber, as settled by Illinois decree. By that decree, Robinson had no right to sell. By the conveyance made to Noble under that decree, he had nothing left in the New York lands but a lien for his \$4,249.58. The sale by Noble was void, and conferred no rights on Robinson whatever. His belief in its validity did not change the matter. By availing himself of the title which was in him originally, and which appeared by the records to be there yet, he sold the lands for twice as much as his lien, and received the money. That he must account to Shillaber in some way is too plain for argument. If Shillaber could, by paying his debt to Robinson, redeem the lands from their present holders, it is the relief which he would prefer, and to which as against Robinson he would be entitled. But Robinson has put this out of his power by a wrongful sale and conveyance to innocent purchasers.

There is no evidence to show that the lands are now worth any more

than Robinson sold them for; no evidence that they were worth more when he sold them. His answer gives the precise sum received by him for each parcel of land, and the date when he received it. He probably believed the land was his own when he sold it; but, as we have seen, he must be considered as holding such title as he had in trust, first for his own debt due from Shillaber, and the remainder for the use of Shillaber. Treating him, then, as trustee, he must account for the money received for the lands, according to the trusts on which he held them. The decree of the Circuit Court dismissing Shillaber's bill must be reversed, and the case remanded to that court, with instructions to render a decree on the basis of charging Robinson with the sums received by him for the lands, and interest thereon until the day of the decree, deducting therefrom the sum found due him from Shillaber by the Illinois decree, with interest to the same time, and rendering a decree for the difference in favor of Shillaber against Robinson, with costs; and it is

So ordered.

SEC. 6. OBLIGATIONS SECURED.

SHIRRAS AND OTHERS v. CAIG AND MITCHEL.

7 Cranch U. S. 34; 3 L. Ed. 260. (1812)

MR. CHIEF JUSTICE MARSHALL, delivered the opinion of the Court.

This is an appeal from a decree rendered by the circuit court for the district of Georgia.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the 1st of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner, the attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears that, on the 17th of May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner, and Robert Mitchel, merchants and copartners of the city of Savannah. In 1799, this partner-

ship was dissolved; and, in December in the same year, James Gairdner made an entry on the books of the company, charging this property to Edwin Gairdner & Co., of Charleston, at the price of twenty thousand dollars. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property. In March, 1801, a partnership was formed between Edwin Gairdner and John Caig, to carry on trade in Savannah, under the firm of Edwin Gairdner and Co.; and in the same month Robert Mitchel conveyed his one-third of the lots in question to Edwin Gairdner and John Caig. About the same time it was agreed, between the house at Charleston and that in Savannah, to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner & Co., of Savannah.

Such was the state of title in December, 1801, when the deed of mortgage bears date * * *

The claim to foreclose is resisted by Caig and Mitchel, because, they say, 1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy. 2d. That the transaction is not *bona fide*, there being no real debt, nor any money actually advanced by the mortgagees. 3d. That the mortgage was kept secret, instead of being committed to record. 4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig and Mitchel. * * *

4th. It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of thirty thousand pounds sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied, that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a vigorous examination. It is, certainly, always advisable fairly and plainly to state the truth.

But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favour of a

person who has been, in fact, injured and deceived by the misrepresentation. That cannot have happened in the present case.

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot or parcel of ground, commonly known by the name of Gairdner's wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed. * * *

SEC. 7. LIABILITY OF MORTGAGOR.

SHEPHERD v. MAY.

115 U. S. 505; 29 L. Ed. 456; 6 Sup. Ct. 120. (1885)

This was an action at law brought by John Frederick May, the defendant in error, against Alexander R. Shepherd, the plaintiff in error, to recover a balance due on a promissory note. The facts disclosed by the bill of exceptions were in substance as follows: On April 26, 1875, May lent Shepherd \$10,000, whereupon Shepherd made and delivered to May a note of that date and amount, payable to his order two years after date, with interest at 10 per cent. per annum, payable quarter-yearly until paid. To secure the payment of the note Shepherd on the same day conveyed to two trustees, with power to sell in default of the payment of the note, a certain improved lot in the city of Washington, of which he was the owner, and which May at that time believed to be good security for the money lent. This deed of trust provided that if default was made in the payment of the note or the interest the trustee should sell the property thereby conveyed at public sale on the following terms: "The amount of indebtedness secured by said deed of trust unpaid, with the expenses of sale in cash, and the

balance at twelve and eighteen months, for which the notes of the purchaser, bearing interest from the day of sale, * * * shall be taken." Before the maturity of the note Shepherd sold the lot to Gilbert C. Walker, and by deed, dated August 1, 1876, for the consideration, as stated in the deed, of \$30,000, the receipt of which was acknowledged, conveyed the same to him. The deed to Walker was made "subject to a certain deed of trust dated the twenty-sixth day of April, A. D. 1875, * * * for the sum of ten thousand dollars," being the same deed of trust executed by Shepherd to secure his note to May. The deed contained a covenant by Shepherd to defend the premises conveyed against the claim of all persons claiming under the grantor, "save and except the aforesaid deed of trust." Shepherd paid the interest on his note to May as it accrued up to the time of his sale to Walker, and after that time Walker paid the interest until the maturity of the note. When the note fell due Walker came to May and told him that "he had the note to pay," and asked May to extend the time of payment for one year, and thereupon May extended the note for one year, Walker agreeing to pay interest thereon at the rate specified in the note. Walker paid the interest upon the note for the year, and at the end of that time asked a further extension for another year. May agreed to extend the time of payment for nine months at the same rate of interest which Walker agreed to pay, but he paid no interest for this period. There was no evidence that Shepherd consented to these extensions of time for the payment of his note. At the end of the nine months allowed by May to Walker for the payment of the note, upon default made, the property covered by the deed of trust was advertised and sold by the trustees. It was purchased by May for the sum of \$8,500, to whom it was conveyed by the trustees by deed dated May 19, 1879. After crediting the note with the net proceeds of sale, May brought suit against Shepherd to recover the balance which he claimed to be due thereon. The jury returned a verdict for May for \$3,163.28, on which the court rendered judgment. Shepherd, by the present writ of error, challenges the correctness of that judgment.

WOOD, J. The first contention of the plaintiff in error is, that by reason of the transaction stated in the bill of exceptions, Walker became the principal debtor of May, and Shepherd became his surety, and as May, upon a valid contract with Walker, extended the time for the payment of the note without the consent of Shepherd, the latter was thereby discharged. The plaintiff in error sought upon the trial to give effect to this contention by asking the court to direct the jury

to render a verdict in his favor. The court having refused to do this, the refusal is now assigned for error.

We have under this assignment of error to decide whether, by the mere conveyance of the premises in question to Walker by Shepherd, subject to the incumbrance created by the deed of trust Walker became bound to May as principal debtor, and Shepherd became his surety. We are of opinion that the conveyance of the premises to Walker did not subject him to any liability to May whatever. To raise such a liability as is contended for by Shepherd, there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred. This was expressly held in *Elliott v. Sackett*, 108 U. S. 132; S. C. 2 Sup. Ct. Rep. 375, where Mr. Justice Blatchford, in delivering the judgment of this court, said: "An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself, personally, to pay the debt. There must be words importing that he will pay the debt to make him personally liable." To the same effect see *Belmont v. Coman*, 22 N. Y. 438; *Fiske v. Tolman*, 124 Mass. 254; *Hoy v. Bramhall*, 19 N. J. Eq. 78; *Fowler v. Fay*, 62 Ill. 375. There are no such words in the deed made by the plaintiff in error to Walker.

Neither is there any other sufficient evidence of any agreement between Walker and Shepherd, whereby the former undertook to pay the debt of the latter to May. The remark made by Walker to May, when he asked to have the time for the payment of the note extended, that "he had it to pay," falls far short of showing any such agreement. As he had bought the property, subject to the incumbrance of the deed of trust for the consideration of \$30,000, which, as appears by the deed to him, he had paid to Shepherd, he might well say that he had the incumbrance to pay without admitting or meaning that he had become personally liable to Shepherd to pay it. His words may be fairly construed to mean that he had the incumbrance to pay or would have to lose the property on which he had already paid \$30,000 of the purchase money. But, even if Walker had said to May that he was liable for the debt, his admission would not have been binding on May so as to establish the fact without other proof. And if Walker had expressly promised May to pay the debt, that would not, without the assent of May, have converted Shepherd from a principal debtor into a surety merely. *Cucullu v. Hernandez*, 103 U. S. 105; *Rey v. Simpson*, 22 How. 341. The only way in which Walker could become the principal

debtor of May, and Shepherd the surety, was by the mutual agreement of all three. There is no proof of any such agreement. It follows that, as the relation of principal and surety did not exist between Walker and Shepherd, the latter was not discharged from his liability to May by the contract of May with Walker to extend the time for the payment of the money due on Shepherd's note. But, even if it had been shown that Shepherd had become the surety of Walker, it was incumbent on the former to show as a part of his defense that the indulgence given by May to Walker was without his assent. *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201; *Bangs v. Strong*, 7 Hill, 250; *S. C.* 42 Amer. Dec. 64; *Cox v. Mobile, etc., R. Co.*, 37 Ala. 323. There was no proof of want of assent. The defense therefore failed.

It is next contended by the plaintiff in error that May is estopped to deny that the note sued on is not paid in full, because the deed of conveyance made to him by the trustees recites that the property was sold to him in accordance with the terms of the deed of trust, and the deed of trust declared that the terms of sale should be the amount due on the note of Shepherd, and the expenses of sale, in cash, and the balance on a credit of 12 and 18 months. This contention is based on the theory that the clause of the deed of trust executed by Shepherd prescribing the terms of sale, and which merely showed his expectation that the property would bring, at least, the amount of the note and expenses of sale, estopped May from denying that the property would, and actually did, bring that amount. There is no estoppel. The proposition amounts to this, that when a mortgagor represents to his mortgagee that the property mortgaged is sufficient security for the debt, and the mortgagee, relying upon the representation, accepts the security, and it turns out that the proceeds of the mortgaged property are insufficient to pay the debt, he is estopped to deny that his debt is paid. The statement of the proposition is its answer. The authorities referred to upon this contention by counsel for Shepherd are cited to sustain the proposition, that a person who accepts a deed of conveyance is estopped to deny recitals therein contained. But as there is no recital in the deed that May had agreed that the property should bring a sum sufficient to pay his note, he is not estopped to deny that the note is paid.

SEC. 8. MORTGAGOR AS SURETY.

UNION MUT. LIFE INS. CO. v. HANFORD.

143 U. S. 187; 36 L. Ed. 118; 12 Sup. Ct. 437. (1892)

This was a bill in equity, filed March 30, 1878, by the Union Mutual Life Insurance Company, a corporation of Maine, against Philander C. Hanford, Orrin P. Chase, Frederick L. Fake, and Lucy D. Fake, his wife, citizens of Illinois, to foreclose by sale a mortgage of land in Chicago, and to obtain a decree for any balance due the plaintiff above the proceeds of the sale. The case was heard upon a master's report, and the evidence taken before him, by which it appeared to be as follows:

On September 9, 1870, Hanford and Chase mortgaged the land to one Schureman to secure the payment of three promissory notes of that date, signed by them, and payable to his order, one for \$5,000.00, in one year, and the second for \$5,000.00 in two years, each with interest at the rate of 8 per cent. annually, and the third for \$6,000.00 in three years, with interest at the rate of 10 per cent. annually.

On January 30, 1871 (the first note having been paid), the plaintiff, through one Boone, its financial agent, bought the mortgage, and Schureman indorsed the remaining notes, and assigned the mortgage to the plaintiff.

On September 9, 1872, Hanford and Chase conveyed the land to Mrs. Fake by deed of warranty, "with the exception of and subject to" the mortgage (describing it), "which said mortgage or trust-deed, and the notes for which the same is collateral security," (describing them,) "it is, hereby expressly agreed shall be assumed, and paid by the party of the second part, and, when paid, are to be delivered, fully canceled, to said Chase and Hanford."

At or about the date of this conveyance, Chase called with Fake at Boone's office, and told him that Hanford and Chase had sold the property to Mrs. Fake, and that she was to pay the mortgage, and Boone, as Chase testified, said, "All right, or something of that sort." At the same interview, Boone, as the plaintiff's agent, in consideration of \$150 paid him by Chase, extended the \$5,000 note until September 9, 1874.

Fake, as his wife's agent, afterwards paid interest on the notes to Boone, as the plaintiff's agent; and on January 9, 1875, for the sum of \$340 obtained from him, without the knowledge of Hanford or Chase, an extension of the notes until September 9, 1875.

The value of the mortgaged premises in September, 1874, was \$18,000 to \$19,000, and at the date of the master's report, in April, 1879, was \$10,000 to \$15,000 only.

The principal defense relied on by Hanford and Chase was that they were discharged from personal liability on the notes by this extension of the time of payment without their consent.

The land was sold by the master, under order of the court for \$12,000, which was insufficient to satisfy the sums due on the mortgage; and the plaintiff, after notice to Hanford and Chase, moved for a deficiency decree for a sum amounting, with interest, to more than \$5,000. The circuit court overruled the motion. 27 Fed. Rep. 588. The plaintiff appealed to this court.

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

Few things have been the subject of more difference of opinion and conflict of decision than the nature and extent of the right of a mortgagee of real estate against a subsequent grantee, who by the terms of the conveyance to him agrees to assume and pay the mortgage.

All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal, and the grantor is the surety, for the payment of the mortgage debt. The chief diversity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

By the settled law of this court, the grantee is not directly liable to the mortgagee at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831. In that view of the law there might be difficulties in the way of holding that a person who was under no direct liability to the mortgagee was his principal debtor, and that the only person who was directly liable to him was chargeable as a surety only, and consequently that the mortgagee, by giving time to the person not directly and primarily liable to him, would discharge the only person who was thus liable. *Shepherd v. May*, 115 U. S. 505, 511, 6 Sup. Ct. Rep. 119; *Keller v. Ashford*, 133 U. S. 610, 625, 10 Sup. Ct. Rep. 494. But the case at bar does not present itself in that aspect.

The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of

the mortgagor only, is, as was adjudged in *Willard v. Wood*, above cited, to be determined by the law of the place where the suit is brought. By the law of Illinois, where the present action was brought, as by the law of New York, and of some other states, the mortgagee may sue at law a grantee who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Dean v. Walker*, 107 Ill. 540, 545, 550; *Thompson v. Dearborn*, Id. 87, 92; *Bay v. Williams*, 112 Ill. 91; *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Coal Co.*, 48 N. Y. 253. According to that view, the grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter; and the relation of the grantee and the grantor towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. Where such is held to be the relations of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt. *Calvo v. Davies*, 73 N. Y. 211; *Bank v. Estate of Waterman*, 134 Ill. 461, 467, 29 N. E. Rep. 503.

The case is thus brought within the well-settled and familiar rule that if a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety; because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract; and it is for the surety alone to judge whether his position is altered for the worse. 1 *Spence*, Eq. Jur. 638; *Samuell v. Howarth*, 3 Mer. 272; *Miller v. Stewart*, 9 Wheat. 680, 703. The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract, (*Edwin v. Lancaster*, 6 Best & S. 571; *Financial Corp. v. Overend*, L. R. 7 Ch. App. 142, and L. R. 7 H. L. 348; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386;) or even if that relation has been created since that time. (*Oakley v. Pasheller*, 4 Clark & F. 207, 233, 10 Bligh, N. S. 548, 590; *Colgrove v. Tallman*, 67 N. Y. 95; *Smith v. Shelden*, 35 Mich. 42.)

In the case at bar, the mortgagee, immediately after the absolute conveyance by the mortgagors, was informed of and assented to that

conveyance and the agreement of the grantee to pay the mortgage debt, and afterwards received interest on the debt from the grantee; and the subsequent agreement by which the mortgagee, in consideration of the payment of a sum of money by the grantee, extended the time of payment of the debt, was made without the knowledge or assent of the mortgagors. Under the law of Illinois, which governs this case, the mortgagors were thereby discharged from all personal liability on the notes, and the circuit court rightly refused to enter a deficiency decree against them.

Decree affirmed.

HICKS v. HAMILTON.

144 Missouri, 495; 66 Am. St. Rep. 432; 46 S. W. 432. (1898)

WILLIAMS, J. Plaintiff held a note secured by a deed of trust upon a lot in Kansas City belonging to one Clark, the maker of the note. Clark conveyed the property subject to said deed of trust to Cowling, but without any assumption by the latter of the mortgage debt. Cowling subsequently transferred said real estate, by warranty deed, to defendant. This deed contains a clause stating that the grantee therein "assumes and agrees to pay" said debt. The property, after the conveyance to defendant, was sold under the deed of trust. There was not enough realized to pay plaintiff's note, and, after crediting thereon the proceeds of the sale, he brought this suit to recover the deficiency from the defendant, on the ground that, by accepting the deed from Cowling, defendant assumed and agreed to pay said debt. * * *

Can plaintiff recover upon defendant's implied promise raised by his acceptance of Cowling's deed, containing a clause binding defendant to assume and pay the mortgage debt? It is well settled that "a person for whose benefit an express promise is made in a valid contract between others may, in this state, maintain an action thereon in his own name": *Ellis v. Harrison*, 104 Mo. 270, and cases cited.

The agreement between the promisor and promisee must possess the necessary elements to make it a binding obligation—in other words, it must be a valid contract between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. A mere naked promise from one to another for the benefit of a third will not sustain an action. Cowling, defendant's grantor, did not owe the mortgage

debt and had never assumed to pay it. Defendant's promise was not therefore to indemnify him. As Judge Smith says: "It must be borne in mind that plaintiff's debt was no part of the consideration for the grant from Cowling to the defendant. Cowling conveyed to the defendant his equity of redemption. He had no other or greater interest in the property. The assumption was therefore without semblance of a consideration passing from Cowling to the defendant. It was an independent promise, unsupported by any consideration whatever."

It is said in the notes to *King v. Paige*, 4 N. Y. Ch. law ed., 1052: "Unless the grantor is personally liable for the debt, the promise of the grantee, the purchaser, is held to be a mere *nudum pactum*, and, of course, without efficacy in favor of either the grantor or mortgagee." The court in *Norwood v. De Hart*, 30 N. J. Eq. 412, held that "a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser unless the grantor was personally liable to pay the debt": *Jefferson v. Asch*, 53 Minn. 446; 39 Am. St. Rep. 618; *Morris v. Mix*, 4 Kan. App. 654; *Nelson v. Rogers*, 47 Minn. 103; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Oshorne v. Cabell*, 77 Va. 462. The liability of a grantee of real estate, who has assumed the payment of a mortgage debt upon it, is sometimes placed upon the doctrines of subrogation. The mortgagee is declared to be entitled to enforce for his benefit "all collateral obligations for the payment of the debt, which a person standing in the situation of a surety * * * has received for his benefit." As between the parties to the deed, the grantor becomes the surety, and the grantee the principal debtor. Of course, no such rule could obtain, where the grantor was not, and had never become, bound for the debt.

If plaintiff is to rest his case upon the proposition that he can recover upon the promise of defendant to Cowling as made for his benefit, he is met by the objection that Cowling was in no manner indebted to or connected with plaintiff, and bore no such relation to him as would give Cowling any interest in having the assumption clause inserted in the deed.

Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, involved precisely the same question that is presented in the case at bar. It was ruled that "a grantee of mortgaged premises whose conveyance recites that the land is conveyed subject to the mortgage, and that the grantee assumes and agrees to pay the same as part of the consideration, is not liable for the deficiency arising upon a foreclosure and sale, in case the grantor was not personally liable, legally or equitably, for the

payment of the mortgage." This court has in several recent opinions cited and approved that case: *Howsmen v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654; *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218; also *Insurance Co. v. Trenton Water Co.*, 42 Mo. App. 118. In *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218, Gantt, C. J., indorsed the following quotation from said opinion: "To give a third party who may derive a benefit from the performance of the promise, an action, there must be: 1. An intent of the promisee to secure some benefit to the third party; and, 2. Some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally * * *. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties."

There are decisions in some of the states which sustain plaintiff's position, but the cases which have heretofore been followed by this court, as well, we think, as the better reason and the weight of authority, are to the contrary.

The judgment of the circuit court is therefore affirmed.

FINLEY v. SIMPSON.

22 N. J. Law, 311; 53 Am. Dec. 252. (1850)

The declaration alleged substantially that the plaintiff, being owner of a piece of land, conveyed the same by deed of bargain and sale to the defendant; that the conveyance was subject to a mortgage, which the defendant, by a covenant contained in the deed, agreed to pay; that the defendant failed to pay the mortgage, and the plaintiff was compelled to pay it. This action was brought for the breach of that covenant. The plaintiff proved his seisin of the land; that the defendant accepted the deed and became seised and possessed of the said land under it. He also offered in evidence the record of the deed; it contained the covenant alleged, and was signed and sealed by the plaintiff, but not by the defendant. The defendant moved for a nonsuit; the motion was overruled and a verdict directed for the plaintiff, subject to the opinion of the supreme court on the admissibility of the deed in evidence.

GREEN, C. J. The general principle that an action of covenant can only be sustained where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority, is abundantly sustained by the authorities cited by the counsel of the defendant. There are, however, exceptions, of which actions upon the custom of London, actions against the king's lessee by patent, and against remaindermen, are admitted instances.

The only inquiry is, whether an indenture of bargain and sale, purporting to be *inter partes*, by which an estate is conveyed to the grantee, if the grantee accept the deed, and the estate therein conveyed, though the indenture be not sealed and delivered by him, is not his deed, as well as the deed of the grantor. The affirmative of the proposition is sustained by the following authorities, cited with many others, in the brief of the plaintiff's counsel: Co. Lit. 231a, 230, C, note 1; Shep. Touch. 177; 4 Cru. Dig. 393, Deed, tit. 32, c. 25, sec. 4; 3 Com. Dig., Covenant, A, 1, Fait, A, 2, C, 2; Vin. Abr., C, Condition, I, a, 2; Burnett v. Lynch, 5 Barn. & Cress. 589; Dyer, 13, C, pl. 66.

A modern elementary writer of high reputation denies the doctrine deduced from these cases, and insists that the action of covenant, unless it be founded on the custom of London, or on a contract between the king and a subject, can only be supported against a person who, by himself or some other person acting on his behalf, has executed a deed under seal; Platt on Cov. 18. He admits, however, that the contrary doctrine has been received without scruple by the profession, has been adopted by writers distinguished for their legal attainments, and that, perhaps, it has been too long established to be now reversed. There is in our judgment no reason why the doctrine should be reversed.

In the present case the verdict ought not to be disturbed, if it can be sustained consistently with legal principle. It is manifestly in accordance with the truth and justice of the case. The objection goes to the form of the remedy, rather than to the substantial right of the party or to the title of the plaintiff to redress. The nature of the covenant, moreover, is fully stated upon the face of the declaration. Whether the facts there stated did or did not constitute a covenant on the part of the defendant, was a question of law, which might well have been raised by demurrer. To give the defendant the benefit of the exception now may operate utterly to defeat the claim of the plaintiff. It is consistent neither with law nor justice that the defendant should hold the title without paying the price. These considerations cannot affect the legal principle, but if the verdict be in accordance with a

doctrine long established, and often recognized, they afford strong reasons why that doctrine should not lightly be disturbed.

The rule to show cause must be discharged.

JACKSON v. DELANCY, *Supra*, p. 279.

SEC. 9. PAYMENT OR TENDER.

SHIELDS v. LOZEAR.

34 N. J. 496; 3 Am. Rep. 260. (1869)

* * * In the United States, the prevailing doctrine in courts of law, as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. 2 Greenl. Cruise. 91, note 1; 4 Kent, 193. In fact, the latter conclusion will necessarily follow, whenever the mortgage is regarded not as a common-law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt. Per Chief Justice Green, in *Osborne v. Tunis*, 1 Dutch, 651; per Justice Southard, in *Montgomery v. Bruers*, 1 South, 279, whose dissenting opinion in the supreme court was adopted in the court of errors in reversing the judgment of the supreme court. 2 South. 865. Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate, for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice Kinsey, speaking of payment after the law-day, says: "When the debt is discharged according to law, the mortgagee has the legal seisin in trust for the mortgagor, and the court will never permit the trustee or those claiming under him to set up this legal estate in him or them, to defeat the possession of the *cestui que trust*. This principle is settled in *Armstrong v. Peirse*, 3 Burr. 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the *cestui que trust* could have

compelled a reconveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7, 1799, Rev. Laws 463; Nix. Dig. (4th ed.) 611, 11, which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance, where the question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named is performance of the condition, and, by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 Johns. 110, on a misapprehension of a passage from *Littleton*. Litt., 335, 338. It was denied by the chancellor in *Merritt v. Lambert*, 7 Paige, 344, and re-affirmed in the supreme court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the court of errors, in the same case on error, 26 id. 541; and by the supreme court in *Arnot v. Post*, 6 Hill, 65; and again denied by the court of errors in reversing the last-mentioned case. *Post v. Arnot*, 2 Denio, 344. Finally, in *Kortright v. Cady*, 21 N. Y. 343, the question was set at rest in the courts of that State by re-affirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that State that a tender of the money due upon a mortgage at any time before foreclosure discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other State. In Massachusetts the decisions have been to the contrary. *Maynard v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen, 522. In an early case in New Hampshire (*Sweet v. Horn*, 1 N. H. 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, etc., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case, the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. *Bailey v. Metcalf*, 6 N. H. 156. It may with safety be said that the doctrine

of the New York courts, originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that State, is without the support of any judicial tribunal in this country; and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named terminates the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default, only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money bond, before the statute, 4 Anne, ch. 16, 12, re-enacted in this State, Nix. Dig. 631, 9, payment after the day would not be pleaded without an acquittance by deed. 2 Saund. 48, c, note 1; *Rosencrantz v. Durling*, 5 Dutch. 191. The statute only applies to payments actually made, and a tender after the day cannot be pleaded. 2 Saund. 48, b, note 1. And if the tender is made on the day it can only be made available by plea, accompanied by payment into court. Co. Litt. 207, a.

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which, by the rules of pleading and established principles of law, the court must deny in an action on the bond, which is the immediate evidence of the debt. If the form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is

in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. 6 Bac. Abr. 456, title "Tender," etc., F. If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed, and the feoffor may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. Co. Litt. 209, a. The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this, courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee with all the rights incident to it. *Grugeon v. Gerrard*, 4 Younge & Coll. Exch. 119-128.

When a court of law undertakes to deal with this equitable estate it must do so upon principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seizin of the mortgagee is not a mere formal title, and no trust will be raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

* * *

BOGERT v. BLISS.

148 N. Y. 194; 51 Am. St. Rep. 684; 42 N. E. 582. (1896)

ANDREWS, C. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the de-

fendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for one thousand dollars, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office, and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2, 1891, Striker applied to Robert (a partner of Weil) for a loan of one thousand dollars, on the security of this extinguished mortgage, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not, as we infer, until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28, 1891, and covered the same premises embraced in the Weil mortgage, and was given to secure a loan of fifteen hundred dollars made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11, 1891, Bliss, when he took his mortgage, made no search of the title, and had constructive notice only of the Weil mortgage. The question is, whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the general term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretense that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to reissue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition, and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this state, a mortgage is a lien simply, and the general principle is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes

connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and reissue it as security for a new loan or transaction, and especially where the rights of third parties are in question. It would make no difference in our view whether the reissue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the reissue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the reissue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person, having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this state.

The statute of frauds does not permit mortgages on land to be created without writing. The reissue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted, it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry, so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record and reissue it at pleasure. A party taking from a mortgagor a reissued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Rob-

ert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing, he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that encumbrance, unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467, is a direct authority upon the question here presented. It was there held that a mortgage, after being once paid by the mortgagor, cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent judgment creditors: See, also, *Cameron v. Irwin*, 5 Hill, 272; *Jones on Mortgages*, sec. 943, and cases cited.

The appellant refers to two cases upon which he particularly relies—*Kellogg v. Ames*, 41 N. Y. 259, and *Coles v. Appleby*, 87 N. Y. 114. *Kellogg v. Ames*, 41 N. Y. 259, was an action to foreclose a mortgage which the plaintiff before maturity purchased from one Douglass, who held an assignment thereof from the mortgagees, regular in form, the plaintiff paying therefor the full amount thereof. Douglass was not a party to the instrument, and he represented to the plaintiff, at the time of the purchase by the latter, that the mortgage was a valid and subsisting security, and the plaintiff purchased in reliance thereon, and took an assignment from Douglass, which he placed on record. Douglass subsequently conveyed the premises to the defendant Ames. It appeared that Douglass, after the mortgage was executed had taken a conveyance of the equity of redemption in the land from the mortgagors, subject to the mortgage which in the deed to him he covenanted to pay. It also appeared that he thereafter, and before the assignment to the plaintiff, had delivered to the mortgagees from time to time hardware, which by agreement they accepted in full payment of the mortgage. The case came up on findings of fact and law, and the court decided the case on the findings alone. There was no finding that when the plaintiff purchased the mortgage he knew of the payment, or that Douglass owned the land or had bound himself to pay the mortgage. It was found that when the mortgage was paid it was the intention that the mortgage should be kept alive. In pursuance of this intention, the mortgagees assigned and delivered the mortgage to

Douglass. The majority of the court held that the plaintiff could enforce the mortgage, but two of the six judges who concurred in the opinion stated that if it had been found that the plaintiff when he took the assignment had notice of the payment by Douglass, and of his relation to the land, they would have been of the opinion that the plaintiff could not recover. So far as appears, all the judges who concurred in the judgment may have held the same view. It was held that the principle of estoppel applied upon the facts found. This case furnishes no precedent for the claim made in the present case. It will be observed that in that case the mortgage was assigned to the plaintiff before it became due according to its terms; that it was apparently a valid security in the hands of Douglass; that the payments thereon were not made by the mortgagor, but by Douglass, with the intention and understanding at the time that it was to be kept alive and not satisfied; that the plaintiff took the assignment in good faith and without notice; and placed his assignment on record before the conveyance by Douglass to Ames. In the present case, the dealing was between Striker, the mortgagor and owner of the premises, and Robert, in respect to a past due mortgage which Robert knew had been paid. Robert doubtless supposed it could be reissued by Striker, and made his loan in reliance on Striker's consent that Weil should assign the satisfied mortgage to him as security for the loan. It was not, in fact, assigned until after Bliss had taken his mortgage. In *Coles v. Appleby*, 87 N. Y. 114, the plaintiff claimed as assignee of a mortgage made by Benham, which one Beach procured to be assigned by the mortgagee to the plaintiff. Beach had purchased the equity of redemption in the land, and bound himself to pay the mortgage. He subsequently paid the amount to the mortgagee, but under the arrangement that the mortgage was not to be satisfied, but that it should be assigned. The court sustained the right of the plaintiff to enforce the mortgage, saying: "The right of the plaintiff to enforce the bond and mortgage does not rest upon a parol agreement to restore the mortgage, but upon the intention at the time to preserve it as a lien, shown by the assignment thereof, and the circumstances attending the transaction."

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter reissued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee,

SEC. 10. UNAUTHORIZED SATISFACTION OF MORTGAGE.

DAY v. BRENTON et al.

102 Iowa, 482; 71 N. W. Rep. 538. (1897)

Suit in equity to foreclose a deed of trust in the nature of a mortgage made and executed by Pat and Mary Kenney, to Peter A. Johnson, covering certain land in Dallas county. Defendants, who are the widow and heirs at law of W. H. Brenton, deceased, claim that decedent was a purchaser of the premises for value, and without notice, and that, at the time he purchased, the deed of trust was apparently satisfied and released of record by Peter A. Johnson, the trustee named therein. The lower court gave plaintiff a judgment and decree, and defendants appeal.

DEEMER, J. The deed of trust in suit conveyed the property to Peter A. Johnson, of Polk county, subject to these conditions: "That if the said Patrick Kenney, his heirs, executors, or administrators, shall pay, or cause to be paid to the Iowa Loan & Trust Company, their executors, administrators, or assigns, the sum of one thousand dollars, on or before the first day of November, 1886, and to James Lamb three hundred eighty-six and $61/100$ dollars on or before the 21st day of March, 1884, and sixty-three and $34/100$ dollars accrued interest, and taxes for 1882, with interest thereon according to the tenor and effect of the promissory notes given to said Iowa Loan and Trust Company, given with the mortgage by James Lamb, and assumed by Johnson and Kenney, and to be paid by P. Kenney, as shown on said notes, then these presents to be void; otherwise, to remain in full force." Appellee claims to be the owner, by indorsement, of the note referred to in these conditions, as payable to James Lamb; and this suit is for judgment on that note, and to foreclose the deed of trust. After the execution of the deed of trust, and on or about the 13th day of November, 1886, Peter A. Johnson, the grantee named therein, made a satisfaction piece, acknowledging that the same was "redeemed, paid off, satisfied, and discharged in full." This satisfaction was duly filed for record with the recorder of Dallas county. Johnson had no authority, express or implied, from appellee, who then held the Lamb note, to enter this satisfaction of record. Thereafter W. H. Brenton purchased the property, relying upon the recorded satisfaction of the mortgage, and believing that the Lamb note had been paid. Appellee contends that the deceased was not justified in relying upon the satisfaction for

two reasons: (1) Because the authority of the trustee was expressly limited to an actual payment of the debts by Kenney to the person or persons who held the notes described in the instrument; and (2) because of a decree entered of record in a suit wherein Peter A. Johnson, by his next friend, was plaintiff, and Pat Kenney was defendant, wherein it was determined that, as between them, Kenney was bound to pay the notes secured by the deed of trust, and further decree "that upon the release of said mortgage to the Iowa Loan and Trust Company, and the payment of said note to James Lamb, or the release of the surety now on said note, that the clerk of this court enter satisfaction of the mortgage made by Pat Kenney and Mary Kenney to Peter A. Johnson, dated March 21, 1883."

To properly solve the questions presented, a further statement of the facts is necessary. It appears from the record that Lamb sold the land covered by the mortgage to G. I. Johnson, the father of Peter A. Johnson, and the father-in-law of Pat Kenney. At the time of the sale, the Iowa Loan & Trust Company held an unsatisfied mortgage upon the property. Johnson, the father, agreed to pay Lamb \$1,450, \$1,000 of which was covered by an assumption and agreement to pay the Iowa Loan & Trust Company mortgage, and the remainder to be paid to Lamb. He caused the land to be conveyed (by Lamb) to his son and son-in-law, and Kenney agreed to pay the consideration to Lamb. Kenney thereupon executed his note to Lamb for the amount stated in the deed of trust, and G. I. Johnson signed same as surety. He also assumed and agreed to pay the mortgage to the Iowa Loan & Trust Company, and at or near the same time, and to indemnify G. I. Johnson and Peter A. Johnson, who owned one-half the property covered by the company mortgage, executed the deed of trust in suit. Afterwards some controversy arose between Peter A. Johnson and Kenney with reference to their rights in and to the premises, and Johnson brought suit against Kenney for partition, and for an accounting between them. In this suit it was decreed that Peter A. Johnson and Pat Kenney were each the owners of an undivided one-half interest in the land; that Kenney was individually bound to pay the mortgage to the trust company and the note in favor of Lamb; and that the mortgages, as between them, were liens upon the land set apart to Kenney, to be first paid therefrom; and further decreed that upon release of said mortgage to the trust company, and payment of the note to Lamb, or the release of the surety on the note, the clerk enter a satisfaction of the mortgage made by Kenney and wife to Peter A. Johnson, being the mortgage or deed of trust in suit. Shortly

after the execution of the note to Lamb, and before its maturity, he sold and indorsed it to plaintiff, and some time thereafter executed a formal assignment, referring to the mortgage in suit. Thereafter the loan and trust company foreclosed its mortgage, and sold the land under execution to Jennie A. Rivers, Rivers sold to Collins, Collins to Hoff, and Hoff to Brenton. Neither Collins, Hoff, nor Brenton had any notice of the mortgage in suit, except such as the record imparted, and some of these grantees expressly say that they relied upon the satisfaction appearing of record at the time they purchased. There is some doubt about Lamb's knowledge of the mortgage to Peter A. Johnson until after it was satisfied of record, but, as the case turns upon another proposition, we will not attempt a solution of the doubt.

As we view it, the case turns upon the authority or apparent authority of the trustee to satisfy the mortgage or deed of trust. In addition to the conditions to which we have referred, this instrument provided: "And it is further agreed that if default shall be made in the payment of said sum of money or any part thereof, principal or interest, or if the taxes assessed on the above-described real estate shall remain unpaid for the space of three months, and after the same are due and payable, then the whole indebtedness shall become due, and the said party of the second part, his heirs or assigns, may proceed by foreclosure or in any other lawful mode to make the amount of said note." It is no doubt true that Peter A. Johnson, the trustee, had no authority to release the deed of trust, except upon payment of the notes secured thereby; and it is conceded that, as between the parties or persons having notice, a release executed by a trustee without authority of the *cestui que trust*, and without having received payment of the debt secured, does not discharge the lien. See Jones, Mortg. section 957; Insurance Co. v. Eldredge, 102 U. S. 545; Williams v. Jackson, 107 U. S. 478, 2 Sup. Ct. 814. The trustee did not have authority in this case to release the deed of trust except upon payment of the notes secured thereby, but the question here presented is somewhat broader than that of the express power of the trustee. It relates more nearly to his apparent authority, or rather to the effect of the release upon subsequent purchasers, who bought the land on the faith of the satisfaction piece appearing of record. Appellee concedes that the trustee had authority, upon payment of the notes secured by the deed of trust, to release the same. Now, if he had this power, will it not be presumed, in the absence of notice to the contrary, that, when he enters satisfaction of the instrument upon the records after the notes secured thereby have matured, the notes are paid, and will not a good-faith purchaser of the

land who buys relying upon this satisfaction be protected against the claims of assignees of the notes secured by the deed of trust? This is the vital question in the case, and the solution of it does not depend so much upon the authority of the trustee to receive payment as upon his power over the security and his right or apparent right to discharge the instrument. As it is conceded he had the power, without joining his *cestui que trust*, to release the mortgage upon payment of the debts secured thereby, it seems to us that, when he does do so, after the debts mature, subsequent purchasers are justified in assuming that the debts have been paid, and in relying upon the record showing the discharge of the mortgage. The satisfaction made by Johnson, the trustee, was entered of record after the debts matured, and expressly stated that the mortgage or deed of trust was "redeemed, paid off, satisfied, and discharged in full." This is a statement made by one having not only apparent, but real, authority, that the debts have been paid, and that the mortgage is satisfied and released. Must a purchaser go further, and see that the debts were in fact paid?

We are aware that the uniform tenor of authorities is to the effect that a trustee has no powers, except those conferred by the instrument creating the trust, and that those given are strictly construed; and we do not overlook the fact that persons dealing with the subject of the trust must take notice of the extent and limitations of the powers conferred; and we do not desire to intrench upon these well-established and salutary rules. But the question here presented cannot be solved by reference to these rules alone. Here is a case where the trustee has the undoubted authority to discharge the deed upon payment of the debt secured thereby. His appointment is accepted by the *cestui que trust*, and they say to the world that, upon compliance with certain conditions, he has authority to release the instrument. He does release it, and subsequent purchasers buy, relying upon this satisfaction. Who is to suffer under such circumstances,—the one who puts it in the power of the trustee to make the discharge, or the one who buys on the faith of the deed of trust being satisfied? Application of certain well-known equitable principles will settle this question. Some of these rules have been thus stated: "Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it." Again: "Where somebody must be a loser by reason of a deceit practiced, he who employs and puts trust and confidence in the deceiver should be the loser, rather than a stranger." Again, it has been said: "Where loss is caused by the fraud of a third person, such loss should fall on the one whose act enabled such fraud to be committed." In

applying these maxims, we have said that where a mortgagee in a mortgage given to secure a certain promissory note negotiates the note to a third person, and then enters a satisfaction of record, such entry will protect a subsequent *bona fide* purchaser of the land from the mortgagor if he had no notice at the time of such purchase that the note was unpaid, or the entry of satisfaction unauthorized. *Cornog v. Fuller*, 30 Iowa, 212. In another case involving the same question (*Bank v. Anderson*, 14 Iowa, 544) we said that parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances without a record notice to guide them. The appellee in this case has no greater or other rights than Lamb, from whom he purchased the note, for he did nothing to indicate that he had any interest in the security. Appellee relies upon the cases of *Weldon v. Tollman*, 15 C. C. A. 138, 67 Fed. 986, and *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37. These cases are much alike in their facts, and differ from this in many important particulars. In the *Weldon Case* the release was by quitclaim deed, and did not purport to be a satisfaction of the deed of trust in execution of the powers conferred upon the trustee. And in both cases it appeared that the release was given before the maturity of the notes secured by the trust deed, and in neither were the notes surrendered to the makers. Moreover, it is expressly held in the *Livermore Case* that a subsequent purchaser who in good faith relied upon a satisfaction entered of record by the *cestui que trust*, as well as the trustee, would be protected, although at the time the satisfaction was entered the *cestui que trust* had disposed of the notes secured by the deed. The uniform course of decisions in this state has been to discourage secret liens, and to protect those who invest their money in reliance upon the integrity of the county records. See *Jenks v. Shaw* (Iowa) 68 N. W. 900, and cases cited.

Some conflict will be found in the authorities bearing upon the questions here considered, but we think the case turns on the application of a few well-defined equitable principles, and that the result reached is in accord with these maxims. See, as sustaining our conclusions, *Field v. Schieffelin*, 7 Johns. Ch. 150; *Ahern v. Freeman* (Minn.) 48 N. W. 677; *Kuen v. Upmier* (Iowa) 67 N. W. 374; *Merrill v. Luce* (S. D.) 61 N. W. 43; *Whipple v. Fowler* (Neb.) 60 N. W. 19; *Jones' Ex'rs v. Clark*, 25 Grat. 656; *Carter v. Bank*, 36 Am. Rep. 341.

The decree upon which appellee relies as notice to appellants' ancestor, that Johnson had no authority to release the mortgage, being the one entered in the partition and accounting case of Johnson against

Kenney, did not take away from Peter A. Johnson his trusteeship; nor did it in any manner abridge or destroy his right to release the trust deed. If it purported to do so, it would be ineffectual, for the reason that neither of the *cestuis que trustent* was made a party to the proceeding, and the district court could not discharge their trustee, and place the clerk of the courts in his stead, without authority from the beneficiaries, or an adjudication in a case to which they were parties. If we treat the suit as *lis pendens*, it does not aid the appellee, for the reasons stated.

Some question is made regarding certain taxes allowed to appellee, and included in the judgment. As these taxes were all recovered under stipulations contained in the deed of trust in suit and the provisions of the loan and trust company mortgage, we need only consider those paid by the trust company, claim for which was assigned to appellee, as the deed of trust to Johnson was satisfied in so far as these defendants are concerned. Appellee is not entitled to recover for taxes paid by the loan and trust company for two reasons: (1) They foreclosed their mortgage in an independent suit, and did not ask to recover for taxes paid. Having failed to do so, they cannot assign a claim therefor, and vest in their assignee a right to recover, for this would allow them to split their cause of action, and foreclose by piecemeal. (2) Appellee did not ask to recover these taxes under the loan and trust company mortgage, but under the one to Johnson, as trustee; and this, as we have seen, was satisfied of record.

Appellants filed a cross petition, in which they asked that the deed of trust be decreed to be no lien upon their real estate, and that the same be declared fully canceled and satisfied of record. This relief should have been granted. The decree of the district court is reversed, and the cause remanded for further proceedings in harmony with this opinion.

Reversed.

SEC. 11. FORECLOSURE.

CLARK v. REYBURN.

8 Wall. (U. S.) 318; 19 L. Ed. 354. (1868)

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.

The amended bill states the following case:

That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for \$5,250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent per annum. On the same day, Clark and wife executed to the complainant a mortgage upon the real estate therein described, conditioned to secure the payment of the note. The mortgage was acknowledged by the grantors, and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who are defendants in this suit. Before the hearing, the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that there was due from Jeremiah Clark \$8,565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the marshal, and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the marshal sold the premises to the complainant for \$7,000, and on the 23d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of \$1,884.25, for the payment of which, the interest of Florinda Clark, in the mortgaged premises is chargeable. That the defendant, Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subsequently to that of the complainant, and is inferior and subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florinda Clark and Few in the mortgaged premises, and for general relief.

Few filed an answer which sets forth, that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florinda Clark, the wife of Jeremiah Clark, and their children, then born or thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which it

is stated is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he has no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest, and that he may be dismissed with costs.

Clark and wife failed to answer. The trust deed referred to in the answer of Few, as made a part of the answer of Mrs. Clark, is not in the record. No replication was filed by the complainant, and no testimony was taken upon either side. The bill was taken *pro confesso* as to Clark and wife, and the case stood upon the bill and answer as to Few.

The court decreed that all the defendants should be forever barred and foreclosed of their right of redemption in the mortgaged premises. The decree does not find either the fact or the amount of the alleged indebtedness. It is silent upon the subject. The record shows no proceeding in relation to it. No time was given either to Mrs. Clark or her trustee within which to pay and redeem. The foreclosure was unconditional, and was made absolute at once. The appeal is prosecuted to reverse the decree.

In our view of the case it will be sufficient to consider one of the numerous objections insisted upon by the counsel for the appellants.

The sale and conveyance by the marshal transferred the entire interest of Jeremiah Clark in the mortgaged premises to Reyburn, but it did not in any wise affect the equity of redemption which had been vested in Few by the trust deed of Clark and wife to him. The equity of redemption would have been barred and extinguished by the decree which ordered the premises to be sold if the proper parties had been before the court when it was made. The bill in that case having been dismissed as to Mrs. Clark and Few, the proceedings left their rights in full force. They were before the court in the case now under consideration, and the trust estate was then for the first time liable to be affected by its action. If there was a balance of the debt secured by the mortgage still unpaid, they were properly proceeded against, and the complainant was entitled to relief. The question to be considered relates to the character of the decree.

Can a decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?

The equity of redemption is a distinct estate from that which is

vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim "once a mortgage always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute.

In this country the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract" within the meaning of the provision of the Constitution upon the subject.

At the date of the execution of this mortgage the act of the territorial legislature of Kansas of 1855, "concerning mortgages," was in force. It directed that in suits upon mortgages the mortgagee should recover a judgment for the amount of his debt, "to be levied of the mortgaged property," and that the premises should be sold under a special *feri facias*. But it also provided that nothing contained in the act should be so construed as to "prevent a mortgagee, or his assignee or the representative of either, from proceeding in a court of chancery to foreclose a mortgage according to the course of proceeding in chancery in such cases." This gave to the complainant in the case before us the option to proceed in either way. He elected to file a bill in equity. No rule

of practice bearing upon the subject, established by the court below, has been brought to our attention.

The 90th rule of equity practice adopted by the Supreme Court, directs that where no rule prescribed by this court, or by the Circuit Court, is applicable, the practice of the Circuit Court shall be regulated by the practice of the High Court of Chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held.

The equity spoken of in the Process Act of 1792, is the equity of the English chancery system.

Spence says: "At length, in the reign of Charles I, it was established that in all cases of mortgages, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day, to be named."

The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed; and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises." We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld. The practice in Illinois is in conformity to these views. In the light of these authorities we are constrained to hold the decree in the case before us fatally defective. * * *

BENDEY v. TOWNSEND.

109 U. S. 665; 27 L. Ed. 1065; 3 Sup. Ct. 482. (1883)

GRAY, J. This is an appeal by James Bendey and wife from a decree for the foreclosure of a mortgage of land in Michigan, executed by them at Houghton, in that state, on April 30, 1873, to Samuel S. Smith and William Harris; expressed to be made in consideration of the indorsement by Smith and Harris of several promissory notes of Bendey therein described, payable to the order of Thomas W. Edwards, at the First National Bank of Houghton; conditioned that Bendey should pay the notes at maturity, and should save and keep harmless the mortgagees "of and from all costs and charges arising from or on account of said indorsements," and empowering the mortgagees, in case of default by Bendey in the payment of the notes, or either of them, to sell the land by public auction and convey it to the purchasers, rendering the surplus money, if any, arising from the sale, to the mortgagors, after deducting the costs and charges of the sale, "and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture under the statute, and the same sum as a solicitor's fee, should any proceedings be taken to foreclose the same in chancery."

The other facts appearing by the record are as follows: Smith & Harris, who were partners, signed their partnership name upon the back of the notes before their delivery to Edwards. One of these notes for \$5,000, became payable on May 4, 1876, and, not being paid by Bendey, was protested for non-payment, and an action was brought thereon by Edwards against Smith & Harris, who, before judgment in that action, paid the amount of the note, with interest. Edwards indorsed the amount as a full payment on the note, and delivered up the note to Smith & Harris; and they entered the amount paid by them upon their books in their general account against Bendey, and afterwards, on September 5, 1877, assigned the mortgage, and the land therein described, "together with the note or obligation therein also mentioned," to "William Brigham and Amos Townsend, trustees." The assignment was in fact made in part payment of debts due from Smith & Harris to firms of which Townsend and Brigham were respectively members. Townsend and Brigham, who were citizens of Ohio, filed a bill in equity against Bendey and wife, who were citizens of Michigan, in a court of this state, alleging the facts aforesaid, and praying for an account, for the foreclosure of the mortgage by sale of

the land, for the payment by Bendey of any balance remaining due to the plaintiff of the principal and interest of the note and mortgage; and for general relief. After the filing of answers and replication, the case was removed, on petition of the defendants, into the circuit court of the United States for the western district of Michigan, and a hearing there had, upon which the facts above stated were proved, and a decree entered that the defendants pay to the plaintiffs the sum of \$7,996.59, with interest, together with a solicitor's fee of \$100, and that in default of such payment the land be sold by public auction, and conveyed under the direction of a master in chancery, and the proceeds of the sale applied to the payment of these sums, and that if the proceeds of the sale should be insufficient for such payment, the amount of the deficiency, with interest, should be paid by Bendey to the plaintiff. From this decree the defendants appealed to this court.

The contract into which Smith & Harris entered, by signing their names on the back of the note before its delivery to the payee, though styled in the mortgage an indorsement, was rather, as towards the payee or a subsequent indorsee of the note, that of joint makers with Bendey. *Good v. Martin*, 95 U. S. 90; *Rothschild v. Grix*, 31 Mich. 150. But, whether their liability in that aspect should be treated as that for promisors, or of guarantors, or of indorsers, it is clear that, having signed their names to the note for the accommodation of Bendey, their relation towards him was that of sureties, and they had the right, upon being obliged to pay the amount of the note on his failure to pay it at maturity, to recover from him the sum so paid. The mortgage, containing a condition to indemnify them against all costs and charges arising from their contract, was security to them for the payment by the mortgagors to them of that sum. The entry, in the regular course of their bookkeeping, of the amount so paid in general account against Bendey, did not merge or extinguish the mortgage, or the personal liability of Bendey to them. The assignment by them to Townsend and Brigham of the mortgage, together with the obligation therein mentioned, was a valid assignment, in equity at least, of the mortgage, as well as of their claim against Bendey for the repayment of the sum paid by them on the note. The assignees were therefore rightly held to be entitled to a decree for the foreclosure of the mortgage, and also, under the ninety-second rule in equity, to a decree against Bendey himself for so much of the sum paid by Smith & Harris, with interest, as the money obtained by the sale of the land under the foreclosure should be insufficient to satisfy. The decree below is therefore right in all respects, except in allowing a solicitor's fee of \$100. The land is in

Michigan; the notes and mortgage were made and payable in Michigan; and by the law of Michigan, as settled by repeated and uniform decisions of the supreme court of that state, a stipulation in a mortgage to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in a foreclosure, either under the statutes of the state or by bill in equity. *Bullock v. Taylor*, 39 Mich. 137; *Myer v. Hart*, 40 Mich. 517; *Vosburgh v. Lay*, 45 Mich. 455; (S. C. 8 N. W. Rep. 91); *Van Marter v. McMillan*, 39 Mich. 304; *Botsford v. Botsford*, 49 Mich. 29; (S. C. 12 N. W. Rep. 897). Upon such a question, affecting the validity and effect of a contract made and to be performed in Michigan, concerning land in Michigan, the law of the state must govern in proceedings to enforce the contract in a federal court within the state. *Brine v. Ins. Co.*, 96 U. S. 627; *Connecticut Ins. Co. v. Cushman*, 108 U. S. 51; (S. C. 2 Sup. Ct. Rep. 236); *Equator Co. v. Hall*, 106 U. S. 86; (S. C. 1 Sup. Ct. Rep. 128).

Decree reversed.

SEC. 12. SALE WITHOUT FORECLOSURE.

CARSON v. BLAKEY.

6 Mo. 273, 35 Am. Dec. 440. (1840)

TOMPKINS, J. Carson, as administrator of Stephens, brought his action of ejectment against Anderson in his lifetime; the death of Anderson being suggested on the record, Blakey and Love were made parties as administrators. The judgment of the circuit court was given in favor of the defendants, and to reverse that judgment, Carson prosecutes this writ of error in this court. The evidence in the case is, that in the lifetime of John Anderson, one George McDaniel became the security of said Anderson for the sum of one thousand dollars, and that Anderson wishing to secure said McDaniel from any loss on that account, executed to him a mortgage for the land here sued for, with a power to McDaniel himself, to sell the premises on certain conditions in the mortgaged deed mentioned. McDaniel sold the land, and Joseph Stephens, the plaintiff's intestate, became the purchaser. It is not contended that the conditions prescribed in the mortgage deed have not been complied with. The only contested point is whether the mortgagor can, consistently with law, constitute the mortgagee a trustee for

the purpose of selling this land, to raise money to pay the debt due to the mortgagee himself from the mortgagor. On the part of the defendants in error it is contended: 1. That under our law, a mortgage with a power of sale in the mortgagee is void. 2. That the only method of obtaining title to the mortgaged premises is, with us, by a sale under a petition for a foreclosure. The act concerning mortgages, of February 18, 1825, found in digest of 1825, p. 593, provides, that in all cases of mortgages of land, etc., where the mortgagee, his executors, administrators, or assigns, shall file a petition in the office of the clerk of the circuit court of the county where the mortgaged premises lie, against the mortgagor, or his heirs, executors, or administrators, etc., setting forth the instrument of writing containing the mortgage, and praying that the equity of redemption may be foreclosed, and the mortgaged premises sold to satisfy the amount then due, the clerk shall issue a summons requiring the defendant to appear, etc.; the cause then proceeds, as do other causes in the circuit court, with this exception, that no sale shall be made within nine months after filing the petition.

Thence it is inferred that in every case of a mortgage the mortgagee must proceed by filing his petition in the circuit court to procure a sale of the mortgaged premises; this is, in my opinion, a mistaken view of the legislative will. No restrictions are imposed by law on the power of alienating lands in Missouri. On the contrary, as they are here easily obtained, every facility is afforded to the owner to alienate, in order that they may better serve his purposes, when he thinks he can better his condition by alienating, and our legislature have interposed to remove many of the obstacles which the courts of chancery in England, by their own authority, have created, to prevent a forfeiture of the mortgaged premises by a failure of the mortgagor to pay the money due on the mortgage at the appointed day. It is true, as contended in argument, that the law still deprives the borrower of money of the power to bind himself to pay a greater interest than ten per cent per year, and might, perhaps, with equal propriety, restrain the power of alienating lands; but the legislative power has not deemed it expedient to do so, it has simply declared, that when the mortgagee, etc., shall file the petition, these proceedings to enable him to collect his money, shall take place, leaving individuals at liberty to settle their own business after their own way, when they choose so to do. For neither the sheriffs nor the clerks appear to be such favorites with the legislature, that mortgagor and mortgagee should be compelled to go into court in order to contribute to their emoluments, nor does the policy of our constitution and laws render the support of a landed

aristocracy so necessary, that courts of law here, should, like the courts of chancery in England, outstrip the legislature in zeal to restrain the alienation of real estate. It not appearing then that this mortgage deed was improperly obtained by McDaniel, from the deceased, John Anderson, the intestate of the defendants in error, I see no reason why, in a court of law, it should not be held valid. The regularity of the proceedings under the deed of mortgage has not been questioned. The judgment of the circuit court ought then, in my opinion, to be reversed; the president of the court concurring in that opinion. * * *

Note: There is an extensive note upon the subject of "Sale under Powers in Mortgages and Trust Deeds" in 92 Am. St. Rep. 573.

CHAPTER XXXV.

EQUITABLE LIENS.

LOVE v. SIERRA NEVADA LAKE WATER & MINING CO.

32 Cal. 639; 91 Am. Dec. 602. (1867)

SHAFTER, J. * * * It appears from these two sources conjointly that the defendant corporation, on the 16th of April, 1860, by Josiah Bates and Samuel S. Atchinson, its trustees, duly authorized for that purpose, made and delivered to the plaintiff and four others its promissory note for the sum of forty thousand pounds sterling, payable one day from the date thereof, with interest thereon from date until paid, at the rate of twenty per cent per annum; that the consideration of said note was forty thousand pounds, loaned and advanced by the payees and others to the corporation before the date of the note; that to secure the payment of the note, the corporation at the date thereof, by its said trustees, Bates and Atchinson, executed, acknowledged, and delivered to the payees the "mortgage" set out in the complaint. In the indenture referred to, the parties are described as "The Sierra Nevada Lake Water and Mining Company, a corporation, by their trustees, Josiah Bates and Samuel Atchinson, of the first part, and plaintiff (and the other payees in the note, naming them), parties of the second part." The conclusion of the indenture is as follows:—

"In witness whereof, the said parties of the first part have hereunto set their several hands and seals, the day and year above written.

"Josiah Bates. (Seal).

"Samuel S. Atchinson. (Seal).

The acknowledgment of the mortgage is to the effect that Bates and Atchinson were personally known to the notary as trustees of said corporation, and that they personally appeared and acknowledged each for himself that he executed the instrument for the uses and purposes therein mentioned, "as and for the free act and deed of Said Sierra Nevada Lake Water and Mining Company." At the execution of the note and mortgage, Bates was president of the company, and Bates and Atchinson were a majority of the trustees; and at and before that

time they agreed for and on behalf of said corporation with the said mortgagees to subscribe the name of "The Sierra Nevada Lake Water and Mining Company" to the said mortgage, and intended so to do, but failed by accident or mistake. The plaintiff was personally interested in the securities to the amount of £24,847, with interest from the date of the note; and the other payees, Ridgway, F. and H. Wedgwood, and Robe, made defendants herein, refused to join as plaintiffs in this action. The remaining defendants are creditors of the Sierra Nevada Lake Water and Mining Company, having judgment liens on the property described in the mortgage, but subsequent thereto.

It is a rule of conveyancing, long established, that deeds executed by an attorney or agent must be executed in the name of the constituent. It was so resolved in *Coombe's Case*, 5 Coke, 135, by Fraser, and the rule was recognized and applied by us in *Echols v. Chenery*, 28 Cal. 159. Tested by this rule, the instrument in suit is not a legal mortgage of the Sierra Nevada Lake Water and Mining Company. The paper is signed and sealed, not by the corporation, but by Bates and Atchinson, acting, so far as the signatures, seals and *testatum* clause throw any light upon the subject, for themselves and in their own right. Though the mortgage does not bind the company at law, it by no means follows, however, that it may not be asserted against it in equity. We consider it as settled that an agreement under seal, made by an attorney for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors, and subsequent purchasers with notice. Or, more precisely stated, an agreement in writing to create a mortgage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien, which will have precedence of subsequent judgment creditors. Am. Lead. Cas. 605; 1 Lead. Cas. Eq. 666, and cases there cited. The jurisdiction is sometimes put upon the ground that equity will aid the defective execution of a power,—sometimes upon the jurisdiction to reform mistakes in written instruments, and sometimes upon the maxim that equity considers that as done which ought to be done. These different modes of expression all amount to the same thing in substance. It was held by this court in *Beatty v. Clark*, 20 Cal. 12, that "though equity will not aid the non-execution of a power, still, where a party undertakes to

execute a power, and by mistake does it imperfectly, equity will, in favor of creditors and others peculiarly within its protective favor, aid the defective execution." We held in *Bodley v. Ferguson*, 30 Id. 511, that a deed of land bad as a conveyance might be good in equity as a contract to convey; and that the equitable right to the legal title was as available for the purposes of defense in an action of ejectment, under our system, as the legal title. We held in *Daggett v. Rankin*, 31 Id. 322, "that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate particular property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien upon the property so intended to be mortgaged." We considered further, that the maxim in equity upon which this doctrine rests is that equity "looks upon things agreed to be done as actually performed; the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." See also *Racouillat v. Sansevain*, 32 Id. 376.

The facts found or admitted in the case at bar bring it broadly within these principles. Bates and Atchinson were a majority of the board of trustees through which the corporate powers were to be executed. The corporation gave the note described in the complaint by Bates and Atchinson, they being duly authorized for that purpose; and they also agreed, "for and on behalf of the corporation," to give a mortgage collateral to the note, to which mortgage the name of the company was to be signed; and the failure to do so was the result of accident or mistake. The power being given, it is apparent on the face of the indenture that the trustees intended to act under the power in the matter of executing the mortgage. The corporation is named in the document as "party of the first part, by Josiah Bates and Samuel Atchinson, trustees." The note which the mortgage was given to secure is described as a note made by the company. Furthermore, the trustees state in their acknowledgment that they executed the mortgage "as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company."

It is urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore the defective execution cannot be aided. The answer is, that where there is a defective execution of a power, it is a matter of no equitable moment whether the error came of a mistake of law or a mistake of fact. It is enough that the power existed, and that there was an attempt to act under it. The relief is

not so much by way of reforming the instrument as by aiding its defective execution; which aid is administered through or by the application of the maxims already quoted. Or as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered as properly executed as a contract for a deed, and therefore as requiring neither reformation nor aid, but as ripe for enforcement according to the methods peculiar to courts of equity. Under our laws, a contract for a mortgage need not be under seal; and when made through an attorney, his authority need not be evidenced by a sealed instrument: Wood's Digest, 106, sec. 6; Angell and Ames on Corporations, 193-266. Though the indenture in this case is under the seals of the trustees, yet when considered as an agreement for a mortgage, it may be treated as a simple contract nevertheless: Lawrence v. Taylor, 5 Hill, 107; Worrall v. Munn, 5 N. Y. 239 (55 Am. Dec. 330); Wood v. Albany etc. R. R. Co., 8 Id. 167; and we consider it clear from the authorities that it is not indispensable, in order to bind the principal at law even, that such contract should be executed in the name and as the act of the principal. On the contrary, it will be sufficient, if upon the whole instrument it can be gathered from the terms thereof that the party described himself and acts as agent, and intends thereby to bind his principal, and not to bind himself: Haskell v. Cornish, 13 Cal. 45; McDonald v. Bear River and Auburn W. & M. Co., 13 Id. 221.

The other objections taken by the appellants to the judgment, though not pressed in argument, have been fully considered by us, and they are all overruled.

CORDOVA v. HOOD.

17 Wall. (U. S.) 1; 21 L. Ed. 587. (1872)

MR. JUSTICE STRONG delivered the opinion of the court.

The appellees must be held to have had notice of whatever equities were revealed in the line of their title. They claim through a conveyance from Hood Sr., who had purchased from Shields in 1859, and the deed from Shields plainly exhibited the fact that the purchase-money remained to be paid. It contained not even a receipt for the consideration of the sale. In form it was a deed of bargain and sale, but there was not enough in it to show that the use was executed in

the vendee. On the contrary, it recites a consideration "to be paid" in instalments at subsequent dates, for which a draft and notes were given. That the vendor, by such a deed, had a lien for the unpaid purchase-money, as against the vendee and those holding under him with notice, unless the lien was waived, is the recognized doctrine of English chancery, and Texas is one of the States in which the doctrine has been adopted. It is a general principle that a vendor of land, though he has made an absolute conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase-money, unless there has been an express or an implied waiver of it. And this lien will be enforced in equity against the vendee and all persons holding under him, except *bona fide* purchasers, without notice. With greater reason, it would seem, should such a lien exist and be enforced when, as in this case, the deed, instead of containing a receipt for the purchase-money, expressly states that it remains unpaid.

The important question to be considered, therefore, is whether the lien has been waived. That there was no express waiver by Shields at the time when his deed to Hood was made and delivered, or at any subsequent time, is not only not proved, but is plainly disproved. Shields himself has testified that the lien was never released by him, and that when the note of his vendee for \$5,015 was taken for the unpaid portion of the larger note given at the time of the sale, it was with the distinct understanding between him and Hood that the payment then made, and the execution of the note for the balance, made no difference whatever respecting the vendor's lien to secure the balance, but "that the land should continue just as liable to secure payment of said balance as before."

It remains then to inquire whether there was any implied waiver of a lien. When the deed was made the vendor took for the purchase-money promissory notes signed not only by Hood, the vendee, but by Hood, Jr., his son. Had the notes been signed by the vendee alone no implication of an intent to waive a vendor's lien could have arisen. It is everywhere ruled that where such a lien is recognized at all it is not affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or his check, if not presented or if unpaid, or any instrument involving merely his personal liability. It is true that, taking a note or a bond from the vendee with a surety, has generally been held evidence of an intention to rely exclusively upon the personal security taken, and therefore, presumptively, to be an abandonment or waiver of a lien. But this raises only a presumption,

open to rebuttal by evidence that such was not the intention of the parties. And we think the evidence in this case clearly shows that neither party to the deed understood that the vendor intended to take the note of Hood, Sr., and Hood, Jr., as a substitute for the lien. The only evidence we have bearing directly upon the subject is in the testimony of Shields. To some extent he does undoubtedly confound his own impressions with what occurred when the notes were given. But we think it may fairly be deduced from his statements that there was no intention then to waive the lien, which the law implied from the terms of the deed. He is unable to state why the son's name was signed in conjunction with the father's, but he is positive that the additional signature was simply a gratuity not called for by the contract nor altering it. He states also there never was any question between himself and his vendee respecting a vendor's lien, adding, it being considered, of course, that his obligation of warranty in the deed would only be made perfect or complete upon the payment of the whole amount of the purchase-money. And that taking the notes as they were taken was not intended as a waiver of a vendor's lien, or at least that it was not understood by the vendee to be such a waiver, is placed beyond doubt by what took place afterwards, on the 1st of April, 1860. There the renewed note was given for a part of the original purchase-money, and it "was positively and unequivocally stipulated and agreed by the vendor and vendee" that the original lien was retained, that the land should continue liable as before. How could this be, if the lien had been waived? Waiver is a thing of intention as well as of action, and it is impossible to believe, in view of this testimony, there was an intention to give up the security of the land. Were this a bill to enforce the lien against the lands in the hands of Hood, the purchaser, it would not be permitted to him to assert that the vendor had, from the first, relied only upon the personal security taken.

And Scroggin and Hanna, the purchasers from Hood, are in no better position. They are not *bona fide* purchasers without notice. As we have seen, the lien for the purchase-money was apparent in the line of their title. The deed from Shields to Hood informed them that the consideration was unpaid. It imposed upon them the duty of inquiring whether it remained unpaid when they were about to make their purchase. Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. Had inquiry been made of the vendor, it would easily have been ascertained that a portion of

the purchase-money remained unpaid. Inquiry of Hood, the debtor, if any such inquiry was made, was an idle ceremony. The deed pointed to the person from whom purchasers from Hood were bound to seek information.

It has been suggested in the argument on behalf of the appellees, that taking up the original note, and giving another note for an unpaid balance of the first, may have terminated the lien if any existed. Undoubtedly no agreement made in 1860, when the new note was given, created a vendor's lien for its security. But the original lien was for all the purchase-money, and for every part of it so long as it remained unpaid. It was not merely security for the notes first given; it was for the debt of which the notes were evidence. Giving the new note was not payment of the debt, it was only a change of the evidence, and, therefore, the fact that it was given did not affect the lien. In *Mims v. Lockett*, it was held that if a vendor of land takes a note for the price, and subsequently renews it, adding in the new note a sum of money due him by the vendee on a different account, his vendor's lien will not be invalidated thereby.

It has been further argued that even if Shields, the vendor, might have enforced a lien against the land had he continued to hold the note, Bartlett, his assignee, cannot. It is contended that a vendor's lien is a personal right of the vendor himself, not assignable. And hence that the assignee of a note given for the purchase-money cannot resort in equity to the land sold. It must be admitted that such is the doctrine of very many cases, perhaps of those which have been best considered, though there are many well-reasoned judgments to the contrary. But we think, for the purposes of the present case, the law, as held by the Supreme Court of Texas, must furnish the rule of decision. And the decisions of that court appear to be that an assignment of the notes given for purchase-money carries with it the lien to the assignee.

It has been held that in order to enforce a vendor's lien, the bill must show that the complainant has exhausted his remedy at law against the personal estate of the vendee, or must show that he cannot have an adequate remedy at law. And this bill makes no such showing. But in Texas, as in some other States, the creditor may proceed in the first instance to enforce the lien in equity.

Upon the whole, then, we think the Circuit Court erred in dismissing the complainant's bill. He was entitled to a decree. * * *

Note: The courts of many states, in particular the New England states, except Vermont, have never adopted the English doctrine of a

vendor's lien. In *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449, it was held that this doctrine did not apply in Massachusetts, and that they would leave the original vendor to secure the payment of the debt due him for the purchase money by the usual attachment on lien process. See also *Falbrook v. Delano*, 29 Me. 410; *Arland v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334.

OBER v. GALLAGHER.

93 U. S. 199; 23 L. Ed. 829. (1876)

Thompson purchased from Fleming, Jan. 15, 1867, a plantation situated partly in Prairie County and partly in Pulaski County, Ark., at the price of \$60,000, to be paid in ten equal instalments, the first March 1, 1867, and the remainder annually thereafter. Notes, negotiable in form, and expressing on their face that their consideration was the purchase of this plantation, were executed by Thompson to Fleming for the several instalments, payable at the times agreed upon. On the same day, the date of the purchase, Fleming and his wife conveyed the property to Thompson by a deed in which, after a recital of the notes for the purchase-money, was the following: "But it is expressly agreed by the parties of the first and second part, that the said parties of the first part shall, and do hereby, retain a lien upon all of said lands for the payment of said ten promissory notes given for the purchase-money, and, when the same are fully paid off, said lien is to stand released and discharged." This deed was recorded in Pulaski County, Feb. 26, 1867. It was also duly recorded in Prairie County. * * *

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

* * * 3. Another objection urged is, that the assignment of the notes by Fleming did not transfer the lien he had reserved as security for their payment. It is undoubtedly true, that, in many of the States, the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase-money does not pass by an assignment of the debt; but here the lien was not left to implication; it was expressly reserved. In fact, it is more than a lien. In equity, it is a mortgage, so made by express contract. The acceptance by Thompson of the deed containing the reservation amounts to an express agreement on his part that the land should be held as security for the payment of what he owed on account of the purchase-money.

This created an equitable mortgage; and such a security passes by an assignment of the debt it secures. We so held in *Batesville Institute v. Kauffman*, 18 Wall. 154, a case which also came from the Eastern District of Arkansas.

It is claimed, however, that the law of Arkansas is different, and that the Supreme Court of that State has decided that a lien to secure the payment of purchase-money, expressly reserved by the vendor in his deed, does not pass by an assignment of the debt. If such was the settled rule of law in the State when the notes which are under consideration in this case were assigned, we should be compelled to recognize it as a rule of property there, and be governed accordingly. *Suydam v. Williamson*, 24 How. 434. But we do not understand such to have been the fact. The first case in which this ruling was made was *Sheppard v. Thomas*, 26 Ark. 617, decided at the June Term, 1871, by a divided court, two out of the five judges dissenting. This case was followed also by a divided court in *Jones v. Doss*, 27 Ark. 518, decided at the December Term, 1872; but almost immediately thereafter, April 24, 1873, the legislature provided by statute as follows:—

“The lien or equity held or possessed by the vendor of any real estate, for the sale of the same, shall inure to the benefit of any assignee of the notes or obligations given for the purchase-money of such real estate, and such lien or equity shall be assignable, and payable by indorsement or otherwise in the hands of such assignee, and any such assignee may maintain an action or suit to enforce the same: Provided, the said lien or equity is expressed upon or appears from the face of the deed of conveyance.” *Pamphlet Laws*, 1873, p. 217, sect. 28.

This legislation was followed, at the December Term, 1873, by the case of *Campbell v. Rankin*, 28 Ark. 401, in which it was strongly intimated, that, if it were necessary, the previous cases in which this question was decided would be overruled. Under these circumstances, we are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase-money expressly reserved would not pass by an assignment of the debt. Such being the case, the Circuit Court was right in following our decision in *Batesville Institute v. Kauffman*, especially as its decision was not made until after the doubts expressed in *Campbell v. Rankin*, as to the correctness of the rulings in the previous cases.

4. It is finally insisted that Gallagher must exhaust his remedies at law before he can come into a court of equity to subject the land. This is not a creditor's bill to reach equitable assets. There is no attempt to

enforce the judgment as a judgment, but to reach securities held for the debt. The suit is in reality one to enforce a mortgage given to secure a note, but not commenced until after the note had gone into judgment at law. The note was merged in the judgment, but the lien which secured it was not; that was simply transferred from the note to the judgment.

An election to sue at law upon a note secured by mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage.

He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained. * * *

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